TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 319.

WILLIAM HENDRIX, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

FILED SEPTEMBER 10, 1909.

(21,814.)

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a *(Præcipe of Attorney for Plaintiff in Error.)*

In re WILL HENDRIX
vs.
UNITED STATES.

On Writ of Error Pending in the Spreme Court of the United States, at Washington, D. C.

To the Clerk of the United States District Court for the Eastern District of Texas, at Paris.

DEAR SIR: You will please copy in the record of the transcript of the above entitled cause,

1st. The transcript of the records of the Court at Pauls valley, Indian Territory, and the bill of indictment.

2nd. The Bill of exception to over-ruling motion to transfer the case back to the District Court of Garvin County, Oklahoma, and affidavit of R. McMillan, attached.

3rd. Record of impaneling a jury, Plea of not Guilty, etc.

4th. Bill of exception to refusal of Court to allow wife to testify.

5th. Finding of jury, Motion for new trial and affidavits of jurors.

6th. Assignment of errors.

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E. W. FAGAN,
Attorney for Will Hendrix, Def't.

(Endorsed:) 2087. United States vs. Will Hendrix. Plaintiff's in error præcipe for transcript. Filed May 16th, 1909. A. O. Brackett, Clerk.)

1 *Caption.*

Be it remembered, That at a Regular Term of the Honorable District Court of the United States, for the Eastern District of Texas, begun and holden at Paris, Texas, on Monday, the first day of March, A. D. 1909, at which the Honorable David E. Bryant, United States District Judge, presided, there came on for trial on May 4th, A. D. 1909, Cause No. 2087, on the Criminal Docket of said Court, and styled, The United States of America vs. Will Hendrix, in which cause the defendant is charged in the indictment therein, with the crime of murder committed in the Indian Territory, and the trial continuing from day to day until May 6th, A. D. 1909, on said last named date, a verdict of guilty in manner and form as charged in the indictment was rendered against the defendant, and the following are the proceedings and determinations in said cause.

2 *Transcript from United States Court in Southern District of Indian Territory, at Pauls Valley.*

In the United States Court in the Indian Territory, Within and for the Southern District Thereof, at Pauls Valley.

No. 1934.

UNITED STATES
vs.
WILLIAM HENDRIX, J. W. DARROUGH, and J. L. HEARD.

Transcript of Record.

Transcript from Indian Territory.

UNITED STATES OF AMERICA,
Southern District Indian Territory, ss:

On this, the 21st day of May, A. D. 1906, the United States Court for the Southern District of the Indian Territory met in regular session in the United States Court Room in the City of Pauls Valley, I. T.

Present and presiding, as follows, to wit:

The Honorable J. T. Dickerson, United States Judge.
" C. M. Campbell, United States Clerk.
" S. H. Wooten, Deputy U. S. Clerk.
" G. A. Porter, United States Marshal.
" J. H. Letherman, Deputy U. S. Marshal.
" George R. Walker, U. S. Attorney.
" Alexander Gullet, Ass't U. S. Attorney.
Guy Sackett, Official Stenographer.

After Court was opened in due form, the following proceedings were had, to wit:

* * * * * * *

In re Organization of Grand Jury.

Comes now the United States Marshal and makes known to the Court that in obedience to an order of this Court he has summoned the persons drawn as Grand Jurors by the Jury Commissioners for the May, 1906 term of the United States Court at Pauls Valley.

That the following persons on the list were not found: Coleman Mosely, T. E. Snow, Claude See, and the following persons
3 were excused by the Court: A. P. Smith, C. D. Wimberly, Joe Kinney: that the following persons were duly summoned and appear- before the Court: (1) L. Baird, (2) W. E. Lokey, (3) Dave Hyden, (4) Field Tucker, (5) H. T. Williams, (6) J. E. Flynt, (7) A. C. Cromer, (8) D. G. Thomas, (9) William Allison, (10) J. E. Burford, (11) W. E. Leath, (12) M. Fraze, (13) T. B. Clements, (14) A. M. Davis, (15) H. K. Brumley, (16) Russ Run-

yan, and it appearing to the Court that the above named persons possess the necessary and requisite qualifications to serve as Grand Jurors and there being no objections offered to the said above named persons, they are thereupon duly qualified, sworn and designated as Grand Jurors for this, the May, 1906, term of this Court, and Dave Hyden, one of the members of said Grand Jury is, by the Court, appointed Foreman.

* * * * * * *

2nd Day, May, 1906, Term.

TUESDAY, *May 22nd*, 1906.

On this day Court opened pursuant to adjournment, present and presiding, as on other days of this term. After Court was opened in due form of law, the following proceedings were had, to wit:

* * * * * * *

In re Grand Jury, Reorganized.

Now at this time it appearing to the Court that a vacancy of two exists in the requisite and necessary number of 16 good and lawful Grand Jurors, as required by law, the Court having heretofore excused L. Baird and W. E. Lokey; It is therefore ordered by the Court that the U. S. Marshal forthwith summon two good and lawful persons to fill said vacancy and to take the place of the said L. Baird and W. E. Lokey, as Grand Jurors. Thereupon comes the U. S. Marshal in open Court and makes known to the Court that he has, in obedience to the order of this Court, duly summoned J. M. Osborne and H. C. Gray to serve as Grand Jurors for the balance of this, the May 1906 Term of this Court, and it appearing to the Court that the said J. M. Osborne, and H. C. Gray possess the requisite and necessary qualifications as required by law to serve as Grand Jurors, and there being no objections offered to the said J. M.
4 Osborne and H. C. Gray and the necessary and requisite number of 16 good and lawful men being complete, to wit: (1) J. M. Osborne, (2) H. C. Gray, (3) Dave Hyden, (4) Field Tucker, (5) H. T. Williams, (6) J. E. Floyd, (7) A. C. Cromer, (8) D. G. Thomas, (9) William Allison, (10) J. F. Burford, (11) W. E. Leath, (12) M. Fraze, (13) T. B. Clements, (14) A. M. Davis, (15) H. K. Brumley, (16) Russ Runyan, and there being no objections offered to any of the above named persons, they were thereupon duly qual. sworn and designated as the Grand Jury. After which the said Grand Jury retire in charge of their sworn bailiff to resume their labors.

* * * * * * *

7th Day, May, 1906, Term.

MONDAY, *May 28th*, 1906.

Now on this day Court opened pursuant to adjournment, present and presiding as of other days. After Court being opened in due form of law, the following proceedings were had to wit:

* * * * * * *

In re Report of the Grand Jury.

Comes now the Grand Jury and all being present and in charge of their sworn bailiff and through their foreman, D. M. Hyden, Esq., submit the following report:

"We have found true bills in the following Commissioner's cases:

* * * * * * *

1934. Murder.

UNITED STATES
vs.
WM. HENDRIX et al.

* * * * * * *

We have found true bills in the following cases in which the defendant has been arrested.

* * * * * * *

We have found the following original true bills.

* * * * * * *

Which said indictments were ordered filed in open Court and in the presence of the Grand Jury and were by the Clerk, duly filed in open Court and in the presence of the Grand Jury.

5 It is further ordered that the proper process issue for all of the above named defendants who are not under bond for their appearance or in custody of the United States Marshal.

After which the Grand Jury retire in charge of their sworn bailiff to further resume their labors.

* * * * * * *

8th Day, May, 1906, Term.

TUESDAY, *May 29th*, 1906.

Now on this day Court opened pursuant to adjournment. Present and presiding as of other days. After Court being opened in due form of law, the following proceedings were had, to wit:

* * * * * * *

Certified Copy of Indictment Served on Defendant Wm. Hendrix.

Crim. 1934.

UNITED STATES
vs.
WM. HENDRIX et al.

Indictment for Murder.

UNITED STATES OF AMERICA,
Indian Territory, Southern District, ss:

In the United States Court in the Indian Territory, for the Southern District of Said Territory, at the May Term, A. D. 1906.

UNITED STATES
vs.
WILLIAM HENDRIX, J. W. DARROUGH, and J. L. HEARD, Defendants.

Copy of Indictment.

The Grand Jurors of the United States of America, duly elected impaneled, sworn and charged to enquire within and for the body of the Southern District of the Indian Territory, in the name and by the authority of the United States of America, upon their oaths do find, present and charge that one William Hendrix, on the fifteenth day of April, A. D. 1906, within the Southern District of the Indian Territory, with force and arms, in and upon the body of one Robert W. Voss, in the peace of the United States of America then and there being, feloniously, wilfully, and of his malice aforethought, did make an assault: and that the said William Hendrix, a certain pistol, then and there charged with gunpowder and one leaden bullet, which said pistol, the said William Hendrix then and there had and held, then and there feloniously, wilfully and of his malice aforethought did discharge and shoot off, to, against and upon the said Robert W. Voss; and that the said William Hendrix with the leaden bullet aforesaid, out of the pistol aforesaid, then and there, by force of the gunpowder aforesaid, by the said William Hendrix discharged and shot off as aforesaid, then and there feloniously, wilfully, and of his malice aforethought did strike, penetrate and wound him the said Robert W. Voss in — upon the *the* front part of the top of head of him the said Robert W. Voss, giving to him the said Robert W. Voss, then and there, with the leaden bullet aforesaid, so as aforesaid discharged and *and* shot out of the pistol aforesaid, by the said William Hendrix, in and upon the front part of the top of the head of him the said Robert W. Voss, one mortal wound; of which mortal wound, he the said Robert W. Voss then and there instantly died.

6 And the Jurors aforesaid do further present that J. W. Darrough

and J. L. Heard, in the said District and Territory aforesaid, before the said felony and murder was committed, in form aforesaid, to-wit on the 15th day of April A. D. 1906, with force and arms, in the District and Territory aforesaid, were accessories thereto before the fact, and did feloniously, and maliciously incite, move, procure, aid, counsel, hire, and command the said William Hendrix to do and commit the felony and murder, in manner and form aforesaid.

And so the Jurors aforesaid, upon their oaths aforesaid, do say, that the said William Hendrix, J. W. Darrough, and J. L. Heard, him, the said Robert W. Voss, in the manner and by the means aforesaid, feloniously, wilfully, and of their malice aforethought, did kill and murder; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

EUGENE HAMILTON,
Assistant United States Attorney, Southern District of Indian Territory.

7 (Endorsed:) #2087. Criminal Docket, No. 1934. In the United States Court, in the Indian Territory, Southern District. United States vs. *vs.* William Hendrix, J. W. Darrough, and J. L. Heard. Indictment for Murder. A True Bill. D. M. Hyden, Foreman of the Grand Jury. Filed in open Court, May 28th, 1906, in presence of the Grand Jury. C. M. Campbell, Clerk. By S. H. Wootton, Deputy. Filed June 3rd, 1906. A. O. Brackett, Clerk, by J. B. Dailey, Deputy. Witnesses for the United States. B. Wood, Ada. Pete Voss, Hart. Nancy Voss, Hart. Minnie Voss, Hart. Jim Hendrix, Hart. George Hall, Hart. David Lobaugh, Hart. Wm. Edwards, Hart. W. C. Rea, Hart. S. R. Boyd, Roff. R. C. Rolan, Roff. Nora Wilaei, Ada. Alexander Gullet, Tishimingo. Wm. Pheffer, Purcell. Rob. M. Cummins, Ada. Susie Bartlett, Hart. B. C. King, Ada. Charlie Brady, Ada. W. H. Key, Lebanon. A. Braeshears, Roff, I. T. Mrs. Roland, I. T. Harrison Nohio, Interpreter, Hugo, I. T. T. E. Brents, Muskogee, I. T. Miss Lillie Copeland, Ada. Hattie Wood, Hart. B. Wood, Ada. W. H. Brinlee, Ada. Maud Wood, Ada.

UNITED STATES OF AMERICA,
Indian Territory, Southern District, ss:

I, C. M. Campbell, Clerk of the United States Court in the Indian Territory, within and for the Southern District thereof, do hereby certify that the within and foregoing is a true and literal copy of the original indictment in the case of the United States versus William Hendrix, J. W. Darrough and J. L. Heard, No. 1934, on the docket of said Court at Pauls Valley, in said District and Territory, and now on file in my office at said Pauls Valley.

And I do further certify that on the 29th day of May, A. D. 1906, at 10 o'clock A. M. I delivered a true and literal copy of said indictment to the Defendant, William Hendrix, in the United States jail in the City of Pauls Valley, I. T.

In testimony whereof I have hereto set my hand and affixed the Seal of the Court this first day of June, A. D. 1906.

[SEAL.]

C. M. CAMPBELL,
U. S. Clerk,
By S. H. WOOTTON, *Deputy.*

8 *Order Removing to Paris.*

1934. Murder.

UNITED STATES
vs.
WM. HENDRIX et al.

Now on this day comes on to be heard, the motion of William Hendrix, herein, to have this cause transferred to the United States Court at Paris, Texas. The Court, being well advised in the presises doth grant said motion and directs the Clerk of this Court to transmit this cause, as to William Hendrix to the United States Court at Paris, Texas, together with the record and all papers herein, there to be docketed for such proceedings as may be legal and proper.

* * * * * * *

Criminal. 1934.

UNITED STATES
vs.
WILLIAM HENDRIX et al.

Transcript from Indian Territory.

Now on this day this cause came on to be heard upon motion of defendant William Hendrix, herein, to be released from the custody of the Marshal of this Court on bail. The Court, after hearing said motion, and being well and sufficiently advised in the Premises, doth overrule the same.

* * * * * * *

UNITED STATES OF AMERICA,
Indian Territory, Southern District, ss:

I, C. M. Campbell, Clerk of the United States Court in the Indian Territory, within and for the Southern District thereof, do hereby certify that the within and foregoing transcript of Record in the case of the United States versus William Hendrix et al., No. 1934, on the docket of said Court at Pauls Valley, in said District
9 and Territory, consisting of Pages 1, 2, 3, 4 and 5, is a true complete and literal copy of the proceedings had in said cause as the same appear of record in my office at Pauls Valley aforesaid.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court this 1st day of June, 1906.

[L. S.] C. M. CAMPBELL,
U. S. Clerk,
By S. H. WOOTTON, *Deputy.*

(Endorsed:) 1934. United States vs. William Hendrix, et al. Murder. Transcript of Record. Filed June 3rd, 1906. A. O. Brackett, Clerk, by J. B. Dailey, Deputy.

10 (*Motion to Transfer Cause to District Court of Garvin County, Oklahoma.*)

Murder. No. 2087.

UNITED STATES OF AMERICA
vs.
WILL HENDRIX.

Motion to Transfer to Indian Ter.

Now comes the defendant Will Hendrix, in the above entitled cause, and respectfully shows the Court that the Crime for which the defendant stands charged in this Court, to wit, the murder of Robert W. Voss, was committed near the town of Pauls Valley, and within the limits of what is now Garvin County, in the State of Oklahoma.

That said cause was transferred from the United States Court within and for the Indian Territory, to this Court before Oklahoma became a State. That under an Act of Congress known as the "Enabling Act", passed June 16th, 1906, all criminal cases pending in the United States Court, within and for the Indian Territory, were transferred to the District Courts of the State of Oklahoma, and of the County of said State where the alleged *a*ffense is said to have been committed.

Wherefore the Defendant prays that this cause be transferred to the District Court of Garvin County, in the State of Oklahoma, to end that cause may be tried in County and State where alleged to have been committed, in pursuance of the Constitution of the United States and the Statutes made in pursuance thereof.

PRUITT & McMILLAN,
E. M. FAGAN,
D. J. KENDALL,
Att's for Defendant.

In the United States Court for the Eastern District of Texas.

I, Robinson McMillan, on my oath do say, that I am now and have been since, previous to the committal of Will Hendrix on his first trial, one of his attorneys of record. That I was instrumental

in having the cause moved from Pauls Valley, Southern
11 District of the Indian Territory, to Paris, Texas, and that my reasons for so doing, were, among other things, but first and most important of all, the undue prejudice of the then presiding Judge of the Southern District of the Indian Territory, to wit; Judge J. T. Dickerson. That, under the Federal Statute, permitting said removal to be made, the same was done by Will Hendrix, on my advice and suggestion, especially for the reason above mentioned, because at the time, both he and I believed that he could not get a fair trial, owing to the prejudice of the said J. T. Dickerson, Judge. That the said J. T. Dickerson was outspoken in his opposition to said Will Hendrix, having talked to me myself, regarding said Hendrix, and made such declarations time and again, as caused me to believe that, though an honest man that he was, and as I believed him to be, that he could not, entertaining such convictions as he claimed to entertain, do justice to the said Will Hendrix in the trial of said cause.

Wherefore, this affidavit is made and filed herein in connection with the motion this day made that the venue be changed back to Pauls Valley, Oklahoma, where it properly belongs.

R. McMILLAN.

Subscribed and sworn to before me, this the 4th day of March A. D. 1909.

A. O. BRACKETT,
Clerk U. S. District Court, E. D. Texas.

(Endorsed:) No. 2087. U. S. vs. Will Hendrix. Motion to transfer to Garvin County Ok. Filed March 4th, 1909, A. O. Brackett, Clerk.

12 (*Arraignment and Plea.*)

In the District Court of the United States for the Eastern District of Texas.

Be it Remembered, That at a Regular Term of the District Court of the United States for the Eastern District of Texas, held in and for the District aforesaid, at the Court Room of said Court in the City of Paris, on Thursday, the 4th day of March, A. D. 1909.—Present the Honorable David E. Bryant, Judge, presiding—the following, among other proceedings were had.

(*Order Overruling Motion to Transfer Case to Oklahoma.*)

No. 2087.

THE UNITED STATES
vs.
WILL HENDRIX.

THURSDAY, *March 4th*, 1909.

The motion of defendant that this cause be remanded to Oklahoma, being considered by the Court, it is ordered that said motion

be overruled, to which action of the Court, the defendant, in open Court, excepted.

* * * * * * *

District Court.

No. 2087, Criminal Docket.

THE UNITED STATES
vs.
WILL HENDRIX.

This cause coming on to be heard, came the United States by her attorney and announced ready for trial, and the Defendant, Will Hendrix, in his own proper person, and by attorney appeared, and announced ready, and the said defendant, being arraigned, plead not guilty, and thereupon came a jury of twelve good and lawful men, to wit: L. R. Alexander, S. A. Patterson, R. B. Hagood, Virgil McCaslin, Austin Bishop, R. J. Acton, C. A. Wartes, G. A. Bell, W. S. Miller, J. R. West, W. C. Marchbanks, and J. M. Robinson, each and all of whom were severally face to face with the defendant and each and all examined, impaneled and sworn as required by law to try this cause, and the d-fendant being accorded the privilege of participating in the examination as to the competency and qualifications of each juror, and of peremptorily challenging not exceeding twenty from the list of jurors, all of whom had first been accepted by the Government and then tendered to the de-
13 fendant for acceptance or rejection, who having heard the plea of the defendant, when, after a portion of the evidence had been heard, and the conclusion of the trial not having been reached at the hour of adjournment, the further consideration of the cause was postponed until an evening session at seven o'clock, and not being concluded at the hour of adjournment of said evening session, was postponed until to-morrow morning at nine o'clock, the jury having been committed to the custody of the Marshal, in charge of a duly appointed and sworn bailiff, at the time of each postponement after being duly cautioned and instructed by the Court.

* * * * * * *

(*Judgment of Conviction.*)

In the District Court of the United States for the Eastern District of Texas.

Be it Remembered, That at a Regular Term of the District Court of the United States, for the Eastern District of Texas, held in and for the District aforesaid, at the Court Room of said Court in the City of Paris, on Saturday the 6th day of March A. D. 1909—present, the Honorable David E. Bryant, Judge Presiding—the following, among other proceedings, were had, to wit:

District Court.

No. 2087, Criminal Docket.

THE UNITED STATES
vs.
WILL HENDRIX.

This *day* coming on, further to be heard, came the United States by her Attorney, and the defendant, Will Hendrix in own proper person and by attorneys appeared and the said defendant, having been duly arraigned, and having plead not guilty on the day before yesterday, *and* thereupon came the jury of twelve good and lawful men, to wit: L. R. Alexander, S. A. Patterson, R. B. Hagood, Virgil McCaslin, Austin Bishop, R. J. Acton, G. A. Bell, W. S. Miller, J. R. West, W. C. Marchbanks, J. M. Robinson, and C. M. Wartes, who having been, on the day before yesterday, duly tried, impaneled and sworn, as required by law, and having heard the plea of the defendant on the day before yesterday, and on yesterday and on the day before yesterday, the evidence and the argument of
14 counsel in the presence of the defendant, and received the charge of the Court, on this day, retired to consider of their verdict, and on the same day brought into open court, the defendant being present in person and by attorney, their verdict in words and figures as follows, to-wit:

"We, the jury, duly impaneled and sworn in the above entitled action, do find from the law and the evidence the within named defendant, William Hendrix, guilty in manner and form as charged in the within indictment without capital punishment.

W. S. MILLER, *Foreman.*

It is therefore, considered by the Court, that the defendant William Hendrix is guilty of the murder of Robert W. Voss in the Indian Territory, as charged in the indictment and as found by the Jury, and it is ordered that he be remanded to the custody of the Marshal to await the judgment and sentence of the Court.

* * * * * * *

(*Judgment and Sentence.*)

In the District Court of the United States for the Eastern District of Texas.

Be it Remembered, That at a Regular Term of the District Court of the United States, for the Eastern District of Texas, begun and held in and for the District aforesaid, at the Court Rooms of said Court, in the City of Paris, on Monday, the 1st day of March, A. D. 1909—Present and Presiding, The Honorable David E. Bryant, Judge of the District Court of the United States, for the Eastern District of Texas—when the following, among other proceedings, were had:

District Court.

No. 2087, Criminal Docket.

THE UNITED STATES
vs.
WILLIAM HENDRIX.

TUESDAY, *March 9th*, A. D. 1909.

On motion of John B. Dailey, Esq., Ass't Attorney of the United States for the Eastern District of Texas, the above named defendant William Hendrix, was this day brought to the bar of the Court, in custody of the Marshal of said District, and being asked by the Court if he had anything to say why the judgment and sentence of the Court should not be pronounced against him, in accordance with the verdict of the jury rendered in this cause on the 6th day of March, 1909, and the law in such case made and provided, and no good cause being shown why the judgment and sentence of the Court should not be pronounced herein,

It is therefore considered by the Court that the defendant is guilty of the murder of Robert W. Voss, in the Indian Territory, as charged in the indictment and as found by the jury, and his punishment is fixed and assessed as follows, to wit:

That he be imprisoned at hard labor in the Penitentiary of the United States situated at Atlanta, in the State of Georgia, for the term and period of his natural life.

It is therefore ordered, adjudged and decreed by the Court, that the defendant be remanded to the custody of the Marshal, and he, by him, committed to the jail of Lamar County, forthwith, and, as soon as practicable, that he be, by the Marshal, conveyed to the United States Penitentiary designated above and there be delivered to the custody of the keeper of the said penitentiary, who will receive and safely keep the said William Hendrix imprisoned at hard labor in said Penitentiary, in execution of the sentence aforesaid and in conformity with the same for the full period of time aforesaid.

It is further ordered that the Clerk of this Court issue a mittimus to the Marshal of this District commanding the due execution of this decree.

And it is further ordered that the Clerk of this Court furnish the Marshal with a certified copy of this judgment, sentence and order, which shall be delivered to the keeper of said United States Penitentiary at Atlanta, Georgia.

This order is qualified by the order this day entered as to the custody of the said Will Hendrix.

16 (*Order Relating to Custody of Defendant Pending Determination of Appeal Proceeding.*)

Order.

In the District Court in and for the Eastern District of Texas.

No. 2087.

UNITED STATES
vs.
WILL HENDRIX.

Order as to Custody Pending Appeal.

MARCH 9TH, 1909.

This cause coming on further to be heard, in open court, this, the 9th day of March, 1909, upon the application of Will Hendrix, defendant, that he be allowed to remain in the jail at this place, Paris, Texas, until the perfection of his appeal, and the determination of this cause, *and* upon consideration the Court hereby allows and orders that the defendant, Will Hendrix, be kept in jail at this place, Paris, Texas, for the next sixty days; and that at the end of sixty days, if his said appeal be then perfected, then in that event, that he still remains in the same jail until the termination of the cause in the Supreme Court of the United States.

On the contrary, if said appeal shall *have* not have been perfected within the next sixty days, then in that event, the said Will Hendrix, be transferred to the Federal Prison at Atlanta, in the State of Georgia.

D. E. BRYANT, *Judge.*

17 (*Motion for New Trial.*)

In the United States District Court, Sitting at Paris, Texas.

UNITED STATES
vs.
WILL HENDRIX.

Motion.

Comes this defendant, Will Hendrix, and moves the Court to set aside the verdict rendered against him by a jury in the above mentioned cause, March 6, 1909, and to grant unto him a new trial and for the following causes and reasons:

1st. That the alleged offense of which he is accused was committed April 1906, at or near Pauls Valley, in the Southern District of the Indian Territory, and which has since become a State, and the territory and people therein are now in Garvin County, State of

Oklahoma; and that under the Constitution and organic law, this cause is triable in the vicinage in which it is alleged to have been committed.

2nd. That this cause having previously been removed from said vicinage to this Court at Paris, Texas, owing to the prejudice of the then presiding judge, Judge J. T. Dickerson, who held Court at Pauls Valley, Southern District Indian Territory, and the said J. T. Dickerson, being no longer judge in that jurisdiction, another judicial officer having succeeded him, the causes for said removal are no longer in existence, and the defendant was entitled to have his cause carried back to be tried in the District and County in which the offense is alleged to have been committed.

3rd. That the verdict in this case is not supported by the evidence.

4th. That the verdict in this cause is contrary to the evidence.

5th. That the Court failed to give a written charge to the jury.

6th. That the Court failed to instruct the Jury on the doctrine of reasonable doubt.

18 7th. That the Court allowed to go to the Jury improper evidence, in this:

It allowed the defendant, Hendrix, to be examined upon a case in which he was alleged to be the prosecutor, that occurred before a Justice of the Peace of Pontotoc County, Oklahoma, in which he was alleged to have had arrested for incest, B. Woods and his sister Hattie, witnesses against him in this case, and allowed the substance of the warrant of arrest and the judgment of the Justice thereon, and the proof introduced in the case, to go before the Jury in this, over the protests of the defendant Hendrix, through his counsel, who asked for the record that was made in that case, averring that the record was the only legal evidence that could properly be introduced, which action of the Court, defendant avers was very much to his own injury, and against the law.

It allowed evidence to go before the jury in this case, of the various and sundry alleged criminal actions of the father of the defendant herein, Will Hendrix, which action of the Court in this cause, the defendant says, was a great injury to him, and as he thinks, was illegal and improper.

8th. That the Court refused the defendant the benefit of the testimony of his wife, Evalina Hendrix, who was present in open Court and ready and willing to testify to many facts, and they the most material to his defense; and of most of these he had no other witness. That she would have testified as to the incestious assault made on her by Robert Voss at Sulphur, Oklahoma, some three years previous to the killing; and thus fully corroborated witness Zora Daniels; that she would have testified to the incestuous assault made by Robert Voss on her on the Thursday night preceding the killing on Sunday, and thus fully corroborated the witness Clemmie Hendrix. But of the following facts, defendant had no witnesses except his said wife, to wit:

That said Robert Voss began his criminal conduct and treatment and incestuous attempts toward said Evalina Hendrix when she was in her sixteenth year. That he, to her knowledge, had similar course

of conduct toward her elder sister, even before that. That he always assured these two girls that he was not their father and that as a fact, their mother, Nancy Voss, was the mother of a child before she was ever married. That in his treatment towards said two girls, Evalina and her sister, the said Robert Voss brought about the separation and finally the divorce between him and Nancy Voss. That he was cruel, working said two girls as plow hands in the fields, marking off their tasks at the beginning of each day, and applying the lash at night if those tasks were left undone. That with all his said conduct and conversation Evalina still regarded him as her father and still retained, in some degree that affection a child should retain for her father. That he often promised them to do better and she still kept his conduct, in a great measure a secret, hoping for his reformation. That on the Thursday night before the killing, after his last assault, she began to see that this course of conduct should not be allowed to go on further. That she resolved to and did tell her husband of said last assault, but before she would tell him she made him agree that he would do nothing rash, but would only go to Voss and endeavor to *to* get him away. That on the day preceding the killing her mother had told her of Voss's threats on defendant's life; that he himself, had threatened Hendrix in her presence, and that she told him of this fact and warned him t*i* watch Voss. That when he went down to where the killing occurred, he went on a mission of peace and not of war. That said Evalina would positively deny that she ever asked said Voss to eat with her after said Thursday, or that he was kept around the premises to wait on her and the children at that time.

Defendant says that he could not have proved these facts by any being in the world except his said wife, and that they were vital to his defense before a Jury.

9th. Defendant says that the Jury in their verdict of guilty without capital punishment did not speak the intent of the entire jury, and that all of said jury did not understand the said verdict meant a life penalty, b*t* believed at the time that they rendered the verdict that it would be a manslaughter verdict. That one of their number, L. R. Alexander, so testified in an affidavit which is hereto annexed, marked Exhibit "A" hereto and made a part hereof, as fully as though herein copied, which speaks for itself, and sustains the statement above that said jury did not understand or intend the verdict rendered.

That three other Jurors, to wit: C. W. Wortes, R. J. Acton and J. M. McCastle, did not understand the verdict any better than did R. L. Alexander, who swore to Exhibit "A" hereto. That three last parties have not yet been seen, but have definitely been heard from, and time is asked for the production of all said jurors so that the Court may understand what their intent was in the finding of said verdict.

Wherefore, defendant prays again, that said verdict be set aside and a new trial be granted him in order that justice may be reached in this cause.

his
WILL x HENDRIX.
mark.

I, ——— ———, make oath that the above petition and affidavit is true in substance and in fact.

his
WILL x HENDRIX.
mark.

Subscribed and sworn to before me, this the 8th day of March, A. D. 1909.

A. O. BRACKETT, *Clerk.*
By JNO. S. STONE, *Deputy.*

EXHIBIT "A."

STATE OF TEXAS,
Delta County:

I, L. R. Alexander, of Delta County, after being duly sworn, say that I was one of the jurors impaneled in the United States Court for the Eastern District of Texas, to try the case of the United States vs. Will Hendrix, at Paris Texas on the 4th day of March, 1909, wherein a verdict was rendered on the 6th day of March, 1909, finding the defendant guilty of murder as charged in the indictment, without capital punishment, that I did not understand what the punishment would be on such a verdict, I understood at the time I agreed to said verdict that the punishment would be only two years in the penitentiary. I was not willing, at any time to
21 find*ing* a verdict carrying a greater penalty than two years and was led to believe that *that* the verdict we rendered would only carry a penalty for two years. I was in favor of a verdict for manslaughter, and did not believe that defendant should receive a greater penalty than two years, and would *have* never have consented to the verdict we rendered, had I thought or believed said verdict would carry with it a life penalty.

L. R. ALEXANDER.

Subscribed and sworn to before me this the 7th day of March, 1909.

R. D. HUMPHREYS, *J. P.,*
Ex Officio Notary Public, Delta County, Texas.

(Endorsed:) No. 2087. United States vs. Will Hendrix. Defendant's motion for new trial. Filed March, 1909, A. O. Brackett, Clerk, by Jno. S. Stone, Deputy.

* * * * * * *

(*Order Overruling Motion for New Trial.*)

No. 2087.

THE UNITED STATES
vs.
WILL HENDRIX.

TUESDAY. *March 9th*, 1909.

On this day came on to be heard the motion of the defendant to set aside the verdict of the Jury rendered in said cause on the 6th day of March, 1909, and grant him a new trial, which motion being duly considered by the Court, the Court is of the opinion that the law is against said motion, It is therefore, ordered adjudged and decreed by the Court, that said motion be, and the same is overruled. To which ruling of the Court, the defendant, through his attorney, in open Court, excepted and gave notice of appeal to the Supreme Court of the United States.

22 (*Affidavit- of L. R. Alexander and R. J. Action, Jurors.*)

UNITED STATES OF AMERICA
vs.
WILL HENDRIX.

Affidavits, Alexander & Acton, Jurors.

We, —— —— — —— ——, on our oaths do say, That we were jurors serving on the jury in the above styled cause, and that as such jurors, we brought into court, a verdict against the defendant of "Guilty, but without capital punishment." That we did not know the full meaning of such verdict at the time we rendered it, that is, that it meant a life sentence in the penitentiary, or we would never have consented and rendered it as our verdict in this cause. We did not know that it would prevent the Judge from reducing the sentence below a life imprisonment, and the time of punishment was discussed among us, and some of us remarked that it meant a sentence of any time from two to ninety-nine years, and this was our common understanding of what the verdict would be. Some of our number were for a light two year sentence, and consented to the verdict reported because, believing that the Court could, that he would, put on defendant a light sentence.

But we say, had we known that the verdict rendered meant a life sentence, and nothing less, we would never have reported it. We did not think defendant deserved so severe a sentence.

L. R. ALEXANDER.
R. J. ACTON.

Subscribed and sworn to before me, this March 9th, 1909.

A. O. BRACKETT, *Clerk*,
By JNO. S. STONE, *Deputy*.

(Endorsed:) U. S. vs. Will Hendrix. Affidavit. Filed March 9th, 1909. A. O. Brackett, Clerk, by Jno. S. Stone, Deputy.

23 (*Affidavit of C. M. Wartes, Juror.*)

In United States District Court, Sitting at Paris, Texas.

Affidavit, C. M. Wartes, Juror.

UNITED STATES
vs.
WILL HENDRIX.

Affidavit.

I, C. M. Wartes, on my oath do say, that I was on the jury in the above cause that returned a verdict into Court Saturday last, of "Guilty, without capital punishment," and that I never intended to give to the defendant a life sentence in that verdict, and had I known the import of that verdict, I would have hung that jury till this hour. I do not think there was a man on the Jury that wanted or expected a life sentence. It was discussed among us as to what the term of service in the penitentiary would be, and it was thought the term of sentence could be two years, and that was all I was for him receiving and so said.

C. M. WARTES.

Subscribed and sworn to before me, this, the 9th day of March, 1909.

A. O. BRACKETT, *Clerk*,
By JOHN S. STONE, *Deputy*.

(Endorsed:) D. Cr. No. 2087. The United States, vs. Will Hendrix. Affidavit of C. M. Wartes. Filed March 9th, 1909. A. O. Brackett, Clerk, by Jno. S. Stone, Deputy.

24 (*Affidavit of Juror J. R. West.*)

Before me, the undersigned authority, this day personally appeared J. R. West, who being duly sworn, on his oath states that he resides near Petty Texas, and that he was a member of the jury that returned a verdict on the 6th day of March, 1909, in which the defendant Will Hendrix, whom the had in charge was found guilty of murder as charged in the indictment without capital punishment. That the judge, in his charge to the jury, instructed the jury that the question of punishment was not for the jury, but

that they should find the fact as to what the defendant was guilty of, whether of murder in the first degree, manslaughter or whether he was justified on the ground of self defense. That affiant fully understood the instructions of the Court, and the matter was discussed in the jury-room, and affiant believes that all the jurors fully understood that they were not to fix the punishment.

During the discussion upon this point, some one of the jury remarked that the punishment was in the discretion of the Court and that in their opinion, the Court could punish the defendant by sending him to the penitentiary for life, or that he might punish him by sending him to the penitentiary as low as two years.

J. R. WEST.

Subscribed and sworn to before me this 9th day of March, A. D. 1909.

A. O. BRACKETT,
Clerk U. S. District Court,
By JNO. S. STONE, *Deputy.*

(Endorsed:) D. Cr. 2087. United States vs. Will Hendrix. Affidavit J. R. West, contra, Motion for New Trial. Filed March 9th, 1909. A. O. Brackett, Clerk, by Jno. S. Stone, Deputy.

25 (*Affidavit of Juror W. S. Miller.*)

In the United States Court for the Eastern District of Texas, at Paris, Texas.

UNITED STATES
vs.
WILL HENDRIX.

I, W. S. Miller, being duly sworn, on his oath says that he reside at Lake Creek in Delta County, Texas; that he was the *fo* foreman of the jury in the above entitled cause who on the 6th of March returned into open Court a verdict finding the defendant, Will Hendrix, guilty of murder as charged in the indictment without capital punishment; that the Judge in his charge instructed the jury, substantially, that the question of punishment was not for the jury, but that they were simply to pass upon the facts whether or not the defendant was guilty of murder in the first degree or manslaughter as these offenses were defined by the Court or whether the defendant should be acquitted on his plea of self defense; that in the discussion the jury all recognized the fact that they had nothing to do with the punishment as charged by the Court, during the discussion some one of the jury remarked that the punishment was in the discretion of the Court and that he might give the defendant a term in the penitentiary for life or he might give him as low as two years. That the questions of murder, manslaughter and self defense were fully discussed by the jury, they all agreed upon the verdict of guilty of murder without capital punishment and they all under-

stood the verdict. The verdict as written was read several times to the jury. They all said it was their verdict and the verdict was returned into Court.

W. S. MILLER.

Subscribed and sworn to before me this, the 9th day of March, 1909.

A. O. BRACKETT, *Clerk,*
By JNO. S. STONE, *Deputy.*

(Endorsed:) U. S. Dis't Court, D. Cr. 2087. The United States vs. Will Hendrix. Affidavit W. S. Miller. Filed March 9th, 1909. A. O. Brackett, Clerk, by Jno. S. Stone, Deputy.

26 (*Petition for 60 Days for Bill of Exceptions, &c.*)

In the District Court of the United States in and for the Eastern District of Texas.

UNITED STATES
vs.
WILL HENDRIX.

Application for 60 Days to File, &c.

In this cause the defendant, Will Hendrix, through his attorney R. McMillan, most respectfully petitions the Court to allow him sixty days from this date in which to prepare his petition for a writ of error and to prepare and file bills of exceptions and to prepare the record for appeal to the Supreme Court of the United States.

R. McMILLAN,
Attorney for Defendant.

(Endorsed:) D. Cr. No. 2087. United States vs. Will Hendrix. Application for 60 days &c. Filed March 9th, 1909. A. O. Brackett, Clerk, by Jno. S. Stone, Deputy.

* * * * * * *

(*Order Allowing 60 Days to Prepare Bill of Exceptions, &c.*)

In the District Court of the United States in and for the Eastern District of Texas.

UNITED STATES
vs.
WILL HENDRIX.

Order Allowing 60 Days to File, &c.

Came the parties, plaintiff and defendant, and their attorneys of record, on this the 9th day of March, upon the application of Will

Hendrix, the defendant herein, for 60 days from this date in which to prepare his petition for a writ of error, to file his Bill of Exception and the full record for appeal to the Supreme Court of the United States. And upon consideration the Court is pleased to and hereby allows said sixty days from this date in which to prepare & file said petition and record.

D. E. BRYANT, *Judge.*

(Endorsed:) D. Cr. 2087. United States vs. Will Hendrix. Order allowing 60 days to prepare and file petition for writ of error &c. Filed March 9th, 1909. A. O. Brackett, Clerk, by Jno. S. Stone, Deputy.

27 *Bill of Exception, No. 1.*

Murder. No. 2087.

UNITED STATES
vs.
WILL HENDRIX.

Be it remembered that on the trial, the following proceedings were had: That on the 4th day of March, 1909, the defendant filed and presented in open Court to the Hon. David E. Bryant, Judge, a motion denying the jurisdiction of said Court, which motion is as follows, to wit:

Murder. No. 2087.

UNITED STATES OF AMERICA
vs.
WILL HENDRIX.

Now comes the defendant, Will Hendrix, in the above entitled cause and respectfully shows the Court that the crime of which the defendant stands charged in this Court, to wit: the murder of Robert W. Voss, was committed near the town of Pauls Valley and within the limits of what is now Garvin County, in the State of Oklahoma, on the 15th day of April, 1906.

That said cause was transferred from the United States Court within and for the Indian Territory, to this Court before Oklahoma became a state. That under an Act of Congress known as the "Enabling Act", passed June 15th, 1906, all criminal cases pending in the United States Courts within and for the Indian Territory, were transferred to the District Courts of the State of Oklahoma, and of the County of said State where the alleged offense is said to have been committed.

Wherefore, the defendant prays that this cause be transferred to the District Court of Garvin County, in the State of Oklahoma, to the end that said cause may be tried in County and State where alleged to have been committed, in pursuance of the Constitution of the United States and the statutes made in pursuance thereof.

28 In the United States Court for the Eastern District of Texas.

I, Robinson McMillan, on my oath, do say that I am now and have been since, previous to the committal of Will Hendrix on his first trial by Court, one of his attorneys of record. That I was instrumental in having the cause moved from Pauls Valley, Southern District of Indian Territory, to Paris, Texas, and that my reasons for so doing were, among other things, but first and most important of all, the undue prejudice of the then presiding Judge of the Southern District of the Indian Territory, to wit: J. T. Dickerson.

That under the Federal Statute permitting said removal to be made, the same was done by the defendant, Will Hendrix on my advice and suggestion, especially for the reason above mentioned, because, at the time, both he and I believed that he could not get a fair trial owing to the prejudice of the said J. T. Dickerson, Judge. That the said J. T. Dickerson was outspoken in his opposition to the said Will Hendrix having talked to me, myself, regarding said Hendrix and made such declarations time and again that caused me to believe that, though an honest man that he was, and as I believed him to be, that he could not, entertaining such convictions as he claimed to entertain, do justice to the said Will Hendrix in the trial of said cause.

Wherefore, this affidavit is made and filed herein in connection with the motion, this day made that the venue be changed back to Pauls Valley, Oklahoma, where it properly belongs.

R. McMILLAN.

Subscribed and sworn to before me this the 4th day of March, A. D. 1909.

A. O. BRACKETT,
Clerk U. S. Court, E. D. Tex.

Which said motion was overruled by the Court, to which action of the Court in overruling said motion, the defendant, then and there excepted, and here presents his Bill of Exceptions, marked No. 1, and prays that it be allowed by the Court and ordered filed as a part of the record in this case.

R. McMILLAN &
E. W. FAGAN,
Attorneys for Defendant.

29 Allowed this April 30th, 1909.

D. E. BRYANT, *Judge.*

(Endorsed:) Cr. No. 2087. United States vs. Will Hendrix. Bill of Exception, No. 1. Filed 30 day Apl. 1909. A. O. Brackett, Clerk, by C. C. Bumpas, Dep.

30 *Bill of Exception, No. 2.*

In the United States District Court, Sitting at Paris, Texas.

UNITED STATES
vs.
WILL HENDRIX.

Be it remembered on the trial of the above entitled cause the following proceedings were had: Defendant had his wife, Evilena Hendrix sworn and placed on the stand to testify in his defense and offered to prove by said witness the following facts, which were material to the defense, as follows, to wit:

That on the Sunday of the killing she had met her husband when he returned home in the buggy, that she had been crying and was very much depressed because of conditions at home; that she went with him to his room, and he asked her what was the matter, and she told him that she could not tell it all now, but for God sake to get her father off the premises; to buy him out, or to trade him out or do something to get him away. That he kept pressing her to tell him and she said no, but after he has gone I will tell you all that has occurred. He kept insisting that she tell him, and at last she told him that on Thursday night (Thursday night before the killing) and during the time that the little girl Clemmie Hendrix was sleeping in her room that Voss, her father, came to her bed and was trying to have intercourse with her. That she screamed and woke Clemmie up and the children and that neither she nor Clemmie slept any more that night; and that she begged him and told him she would scream and prevailed upon him until she got him to go away. He told her that she must not kick, that she was a bastard and not his child, but that she finally was successful and got him to go away. That she knew that if she let this thing go on and her husband found it out from some other source that he would believe that she was living untrue to him. That, knowing her husband's disposition, and that if she would tell him the whole truth, that he would kill her father, that under this impression she cried and took on, and that was the reason she told her husband what occurred and went no further than she did. That she had
31 before this told her husband of the affair at Sulphur, but said that her father had agreed to let her alone in the future, and she had asked her husband to do nothing about it and that he had agreed to do nothing about it then, but had known all about the Sulphur incident all the time. That on the day of the killing when he returned in the buggy he was suspecting nothing, but upon seeing her condition the conversation hereinbefore related took place. That thereafter the killing occurred. Defendant proposes to show by this witness that her father was a man of reasonably fair education. That she herself nor any of her brothers or sisters could read or write. That he was a leacherous man and that she herself had seen him go to bed of her elder sister. That she has had to watch

him since she was sixteen years old; and that when she was sixteen years old he assailed her. That her mother knew full well his disposition and that the evening before the killing her mother knew something of it and asked her why she had come over to her house to get her to stay all night with her. That that night her mother said "Lee I'm afraid there is going to be trouble between Will and the old man." That she said that while going across the field toward Will Hendrix's home. She denies that there *was* three trips made by Will Hendrix in an easterly direction from his house before the old man was killed, and denies that Will Hendrix, after the killing, went to the house where the killing occurred three times. That at the time of the shots there was a turmoil of excitement, and she supposes she stated what was related by her mother "there, Pa has killed my baby" as that was what she expected to happen if he got the drop on Will, that he would kill him. That Will's mission down there was to get the old man away and not to have any trouble, and that she thought at the time the shots were fired that Will had gone down there and the old man had killed him.

The United States, through her attorney, the Hon. Jno. B. Dailey, objected to the introduction of said witness, on the ground that she was the wife of defendant and therefore incompetent as a witness in said cause. The Court sustained said objection and refused
32 to allow said witness to testify in the case. To which action of the Court, in sustaining said objection and refusing to allow said witness to testify in his defense, the defendant, then and there, excepted, and here presents his Bill of exception No. 2 and asks that it be allowed, signed and ordered filed as a part of the record in said cause.

R. McMILLAN &
E. W. FAGAN,
Attorneys for Defendant. Will Hendrix.

Allowed this April 30, 1909.

D. E. BRYANT, *Judge.*

(Endorsed:) Cr. No. 2087. United States vs. Will Hendrix. Bill of exception, No. 2. Filed Apl. 30, 1909. A. O. Brackett, Clerk, by C. C. Bumpas, Dep.

33 *Petition for Writ of Error.*

In the District Court of the United States for the Eastern District of Texas, at Paris.

Will Hendrix, a citizen of the United States, and a resident of the State of Oklahoma, formerly the Chickasaw Nation, Indian Territory, respectfully represents that on the 15th day of April 1906, he was arrested in said Chickasaw Nation, Indian Territory, and confined in the United States jail at Pauls Valley; was charged with having committed the crime of murder; was returned into Court at Pauls Valley in said Chickasaw Nation, Indian Territory.

Said Court was presided over by the Hon. J. T. Dickerson, District Judge for the Southern District of Indian Territory. That after said indictment had been so returned, defendant, Will Hendrix, obtained a change of venue from said Southern District of the Indian Territory to the United States District Court for the Eastern District of Texas, at Paris, Texas, presided over by the Hon. David E. Bryant, Judge. And on said indictment, defendant Will Hendrix, on trial on the 4th day of March, 1909, and afterward to wit; on the 6th day of March, 1909, the jury selected to try said cause, returned into court a verdict finding your petitioner guilty as charged in the said bill of indictment (without capital punishment) and on the 9th day of March, 1909, Hon. David E. Bryant pronounced and filed and entered sentence that your petitioner be imprisoned at hard labor in the penitentiary of the United States, situated at Atlanta, Georgia, for the term and period of his natural life.

34 Your petitioner alleges that in the trial and proceedings in said cause, great and manifest errors were committed which will appear upon an inspection of the record in said cause. That he has not had a fair and impartial trial by a court having legal jurisdiction over him. That he has not been convicted by due process of law.

Wherefore, your petitioner prays for a writ of error to be directed to the Clerk of the District Court of the United States, at Paris, Texas, directing him to transmit a true copy of the record and all proceedings in this cause under his hand and the seal of this Court.

R. McMILLAN &
E. W. FAGAN,
Attorneys for Petitioner.

Allowed this April 30th, 1909.

D. E. BRYANT, *Judge.*

(Endorsed:) Cr. No. 2087. United States vs. Will Hendrix. Petition for writ of error. Filed 30 day of Apl. 1909. A. O. Brackett, Clerk, by C. C. Bumpas, Dep.

35 *Assignment of Errors.*

In the District Court of the United States, Eastern District of Texas, at Paris, Texas.

THE UNITED STATES
vs.
WILL HENDRIX.

Now comes Will Hendrix, defendant in the above entitled cause complaining of the trial, judgment, proceedings, rulings and sentence in said cause, and says that he has been tried and convicted without due process of the law of the land, and that he has been deprived of his liberty and sentenced to penal servitude for life without jurisdiction so to try and convict him.

Your respondent, Will Hendrix, alleges that in his trial and conviction great and manifest errors, to the injury of respondent were committed which he specifies as follows:

1st. Because the United States Court for the Eastern District of Texas, did not have jurisdiction to try said cause, and the Court erred in overruling defendant's motion to transfer said case to the District Court of Garvin County, Oklahoma, because, under the "Enabling Act" under which Oklahoma became a State, passed by Congress June 16th, 1906, all criminal cases pending in the United States Courts within and for the Indian Territory, were transfer-ed to the District Courts of the State of Oklahoma and to the County of said State wherein the alleged offense is said to have been committed, and the offense for which defendant was tried in this cause was committed in what is now Garvin County, State of Oklahoma.

2nd. The Court erred in sustaining the objection of the United States to the introduction of defendant's wife, Mrs. Evilina Hendrix and refusing to allow her to testify in behalf of defendant, for the reason that her testimony as shown by the Bill of exception in this cause was vitally material to his defense, and stated facts defendant could not prove by any other witness, and because, under the criminal procedure of the State of Texas, the forum where the case was tried, permits a wife to testify in her husband's defense.

3rd. The Court erred in overruling defendant's motion for
36 a new trial in this cause and in refusing to grant defendant a new trial, because,

1st. The United States Court for the Eastern District of Texas was without jurisdiction.

2nd. Because defendant's wife was not allowed to testify in his defense.

3rd. Because the attorney for the United States was permitted to prove, over the objection of defendant that defendant's father had committed crimes in the Indian Territory and because that the Jurors did not understand that their verdict would carry with it a life sentence for this defendant, as shown by Bill of Exception, No. — and affidavits of said jurors attached to said motion.

For the errors stated and apparent upon the record herein, respondent prays that the judgment be reversed and the cause remanded for a new trial.

Defendant, WILL HENDRIX,
By His Attorneys, R. McMILLAN &
E. W. FAGAN.

(Endorsed:) United States vs. Will Hendrix. Assignment of Errros. Filed 30 day Apl. 1909. A. O. Brackett, Clerk, by C. C. Bumpas, Dep.

37 In the District Court of the United States for the Eastern District of Texas, at Paris.

D. Cr. No. 2087.

THE UNITED STATES OF AMERICA
vs.
WILL HENDRIX.

The President of the United States of America to J. W. Ownby, United States Attorney and Attorney of Record for the Defendant in Error, The United States, Herein and Below Mentioned, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States in the City of Washington, within thirty days from the date of this writ, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Eastern District of Texas, at Paris, Texas, wherein William Hendrix is plaintiff in error and the United States of America, is defendant in error, to show cause, if any there be, why the judgment rendered against said William Hendrix, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable David E. Bryant, Judge of the United States District Court for the Eastern District of Texas. This 30th day of April, A. D. 1909.

[Seal United States District Court, Eastern District of Texas.]

D. E. BRYANT,
United States District Judge.

[Endorsed:] U. S. District Court, E. D. T., at Paris. No. 2087. D. Cr. William Hendrix, appellant, vs. The United States, appellee. Citation. Issued April 30th, A. D. 1909. A. O. Brackett, clerk. Returned and filed May 8th, 1909. A. O. Brackett, clerk, by Jno. S. Stone, deputy.

Marshal's Return.

Received this writ at Beaumont Texas, May 5th '09, and on May 6th '09, I handed a certified copy to the within named J. W. Ownby, in person at Beaumont Tex.

A. I. HOUSTON,
U. S. Marshal,
By F. A. PARKER, *Deputy.*

38 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judge of the District Court of the United States for the Eastern District of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court, before you, or some of you, between William Hendrix, plaintiff in error, and The United States of America, defendant in error, a manifest error has happened to the great damage of the said William Hendrix, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same to The Supreme Court of the United States together with this writ, so that you have the same at the City of Washington on the 31st day of May, next in the said Supreme Court, to be then and there held, and the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness, the Honorable David E. Bryant, Judge of the District Court of the United States for the Eastern District of Texas, the 30th day of April, in the year of our Lord, nineteen hundred and nine.

[Seal United States District Court, Eastern District of Texas.]

A. O. BRACKETT,
Clerk of the United States District Court,
Eastern District of Texas.

Allowed, April 30th, 1909, by

D. E. BRYANT,
United States District Judge.

I hereby certify that a true copy of the above writ has this day April 30th, 1909, been filed in the Clerk's office for use of defendant in error.

A. O. BRACKETT, *Clerk.*

[Endorsed:] No. 2087. Criminal Law. United States District Court, Eastern District of Texas, at Paris. William Hendrix, appellant, vs. The United States, appellee. Writ of error. Filed April 30, 1909. A. O. Brackett, clerk.

39 *(Clerk's Certificate.)*

I, A. O. Brackett, Clerk of the District Court of the United States for the Eastern District of Texas, do hereby certify that the above and foregoing is a full, true and correct transcript of the record,

bills of exception, assignment of errors, and all the proceedings in cause No. 2087, on the Criminal Docket of said Court, wherein The United States of America is Plaintiff and William Hendrix is Defendant, constituted and prepared in accordance with, and being all the papers enumerated in the præcipe for transcript filed by the attorney for the plaintiff in error, as fully as the same remain on file and of record in my office at Paris, Texas.

Witness my hand officially and the seal of said court at Paris, Texas, this the 17th day of May, A. D. 1909.

[Seal United States District Court, Eastern District of Texas.]

A. O. BRACKETT, *Clerk,*
By JNO. S. STONE, *Deputy.*

40 (*Clerk's Certificate of Transmissal.*)

I, A. O. Brackett, Clerk of the District Court of the United States for the Eastern District of Texas, do hereby certify that I received this writ on the 30th day of April, 1909, and that on this 25th day of May, 1909, I have transmitted to the Clerk of the Supreme Court of the United States at Washington, D. C., a true copy of the record and proceedings in the within named cause, duly certified under my hand and seal.

Witness, my hand and the seal of said Court, at my Office in the City of Sherman, the date and day last above named.

[Seal United States District Court, Eastern District of Texas.]

A. O. BRACKETT, *Clerk.*

Endorsed on cover: File No. 21,814. E. Texas D. C. U. S. Term No. 319. William Hendrix, plaintiff in error, vs. The United States. Filed September 10th, 1909. File No. 21,814.

Office Supreme Court, U. S.
FILED.
OCT 3 1910
JAMES H. McKENNEY,
CLERK.

(21,814.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1910.

NO. 319.

WILLIAM HENDRIX, PLAINTIFF IN ERROR,

Vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

MOTION TO ADVANCE UNDER RULE 30, SUBDIVISION 4.

(21,814.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1910.

NO. 319.

WILLIAM HENDRIX, PLAINTIFF IN ERROR,

Vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

MOTION TO ADVANCE UNDER RULE 26, SUBDIVISION 3.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

I.

This is a criminal case. The plaintiff in error, William Hendrix, was, on the 28th day of May, 1906, indicted in the United States Court in the Indian Territory, within and for the southern district thereof at Pauls Valley, for the alleged murder of Robert W. Voss.

Said case was transferred to the United States District Court in and for the Eastern District of Texas, where on the 6th day of March, 1909, the said plaintiff in error, William

Hendrix, was by a jury found guilty in manner and form as charged in the indictment, without capital punishment. Print. Tr. of Record, pp. 3, 5, 7, 11.

On March 9th, 1909, in said United States District Court, in and for the Eastern District of Texas; the said plaintiff in error, William Hendrix, was adjudged guilty of the murder of Robert W. Voss in the Indian Territory, as charged in the indictment, and as found by the jury, and his punishment fixed and assessed, that he be imprisoned at hard labor in the penitentiary of the United States, at Atlanta, in the state of Georgia, for the term and period of his natural life. Which judgment and sentence is as follows, to-wit:

DISTRICT COURT.

No. 2087, Criminal Docket.

THE UNITED STATES

Vs.

WILLIAM HENDRIX.

"Tuesday, March 9th, A. D. 1909.

On motion of John B. Dailey, Esq., Assistant Attorney of the United States for the Eastern District of Texas, the above named defendant, William Hendrix, was this day brought to the bar of the court, in custody of the Marshal of said district, and being asked by the court if he had anything to say why judgment and sentence of the court should not be pronounced against him, in accordance with the verdict of the jury rendered in this cause on the 6th day of March, 1909, and the law in such cases made and provided, and no good cause being shown why the judgment and sentence of the court should not be pronounced herein,

It is therefore considered by the court that the defendant is guilty of the murder of Robert W. Voss, in the Indian Territory, as charged in the indictment and as found by the jury, and his punishment is fixed and assessed as follows, to-wit:

That he be imprisoned at hard labor in the penitentiary of the United States, situated at Atlanta, in the state of Georgia, for the term and period of his natural life.

It is therefore ordered, adjudged and decreed by the court, that the defendant be remanded to the custody of the marshal, and be, by him, committed to the jail of Lamar county, forthwith, and, as soon as practicable, that he be, by the marshal, conveyed to the United States penitentiary designated above and there be delivered to the custody of the keeper of the said penitentiary, who will receive and safely keep the said William Hendrix imprisoned at hard labor in said penitentiary, in execution of the sentence aforesaid.

It is further ordered that the clerk of this court issue a mittimus to the marshal of this district commanding the due execution of this decree.

And it is further ordered that the clerk of this court furnish the marshal with a certified copy of this judgment, sentence and order, which shall be delivered to the keeper of said United States penitentiary, at Atlanta, Georgia.

This order is qualified by the order this day entered as to the custody of the said Will Hendrix." Print. Tr. of Record, p. 12.

That said plaintiff in error, William Hendrix, was by the Honorable D. E. Bryant, judge of said United States

Court, for the Eastern District of Texas, ordered to be kept in jail at Paris, Texas, pending his appeal and the determination of his cause. Print. Tr. of Record, p. 13.

The said plaintiff in error, William Hendrix, is now in jail at Paris, Texas, awaiting the determination of his cause as shown by the following affidavit:

THE STATE OF TEXAS,)
Lamar County.) Before me, the undersigned authority, on this day personally came J. E. Harvey, who after being by me duly sworn, on his oath states, that he is deputy sheriff and jailer of Lamar county, Texas; that William Hendrix, who was ordered by the Honorable D. E. Bryant, judge of United States Court for the Eastern District of Texas, to be kept in the jail at Paris, Texas, to await the determination of his cause in the Supreme Court of the United States, is in custody in said jail, at Paris, Texas, awaiting the decision of his case.

J. E. HARVEY.

Sworn to and subscribed before me, this September 22d, A. D. 1910.

CHAS. S. NEATHERY,

Justice Peace and ex-officio a Notary Public in and for Lamar county, Texas. (Seal of Office.)

II.

In this case, *inter alia*, the jurisdiction of the United States District Court for the Eastern District of Texas to try the cause, and the trial, conviction, and sentence of plaintiff in error to penal servitude for life, without due process of the law of the land, are drawn in question.

III.

The plaintiff in error therefore prays that the case may be advanced upon the docket, and heard at as early a day as may be convenient to the court.

Notice of this motion has been served on the Attorney General and proof of service filed with the clerk of this court.

Respectfully submitted,

JAMES G. DUDLEY,

Of Counsel for Plaintiff in Error,

William Hendrix.



(5819)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-

WILLIAM [redacted], PLAINTIFF IN ERROR,

v.

THE UNITED STATES

ON WRIT OF THE SUPREME COURT OF [redacted]

BRIEF FOR PLAINTIFF IN ERROR

[redacted]

(21,814.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1910.

NO. 319.

WILLIAM HENDRIX, PLAINTIFF IN ERROR,

Vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case:

Plaintiff in error, William Hendrix, was, on the 28th day of May, 1906, indicted in the United States Court in the Indian Territory within and for the Southern District thereof, at Pauls Valley, for the alleged murder of Robert W. Voss. Said case was transferred from the said United States Court in the Indian Territory, to the United States Court in and for the Eastern District of Texas, at Paris, Texas, by the following order:

ORDER REMOVING TO PARIS.

1934.—Murder.

UNITED STATES

Vs.

WM. HENDRIX.

"Now, on this day comes on to be heard the motion of William Hendrix herein, to have this cause transferred to the United States Court at Paris, Texas. The court being well advised in the premises, doth grant said motion and directs the clerk of this court to transmit this cause, as to William Hendrix, to the United States Court at Paris, Texas, together with the record and all papers herein, there to be docketed for such proceedings as may be legal and proper." Print. Tr. of Record, page 7.

On the 4th day of March, 1909, in the district court of the United States for the Eastern District of Texas, the plaintiff in error, William Hendrix, objected to the jurisdiction of said court, as appears from the following bill of exceptions:

BILL OF EXCEPTIONS NO. 1.

Murder.—No. 2087.

UNITED STATES

Vs.

WILL HENDRIX.

Be it remembered that on the trial the following proceedings were had; that on the 4th day of March, 1909, the defendant filed and presented in open court to the Honorable David E. Bryant, judge, a motion denying the jurisdiction of said court, which motion is as follows, to-wit:

Murder.—No. 2087.

UNITED STATES OF AMERICA

Vs.

WILL HENDRIX.

"Now comes the defendant, Will Hendrix, in the above

entitled cause, and respectfully shows the court, that the crime for which the defendant stands charged in this court, to-wit: the murder of Robert W. Voss, was committed near the town of Pauls Valley and within the limits of what is now Garvin county, in the state of Oklahoma. That said cause was transferred from the United States Court within and for the Indian Territory to this court before Oklahoma became a state. That under an act of Congress, known as the "Enabling Act," passed June 16, 1906, all criminal cases pending in the United States Court, within and for the Indian Territory, were transferred to the District Court of the State of Oklahoma, and of the county of said State where the alleged offense is said to have been committed. Wherefore the defendant prays that this cause be transferred to the District Court of Garvin county, in the State of Oklahoma, to the end that the cause may be tried in the county and state where alleged to have been committed, in pursuance of the Constitution of the United States, and the statutes made in pursuance thereof."

"*In the United States Court for the Eastern District of Texas*:

"I, Robinson McMillan, on my oath do say, that I am now and have been since previous to the committal of Will Hendrix on his first trial, one of his attorneys of record. That I was instrumental in having this cause moved from Pauls Valley, Southern District of the Indian Territory, to Paris, Texas, and that my reasons for so doing were, among other things, but first and most important of all, the undue prejudice of the then presiding judge of the Southern District of the Indian Territory, to-wit: Judge J. T. Dickerson. That, under the Federal Statute, permitting said removal to be made, the same was done by Will Hendrix on my advice and suggestion, especially for the reason above mentioned, because at the time, both he and I believed that he could not get a fair trial, owing to the prejudice of said J. T. Dickerson, judge; that said J. T. Dickerson was out-

spoken in his opposition to said Will Hendrix, having talked to me myself regarding said Hendrix, and made such declarations time and again, as caused me to believe that, though an honest man that he was, and as I believed him to be, that he could not, entertaining such convictions as he claimed to entertain, do justice to said Will Hendrix in the trial of said cause.

Wherefore this affidavit is made and filed herein in connection with the motion this day made, that the venue be changed back to Pauls Valley, Oklahoma, where it properly belongs."

(Signed) R. McMILLAN.

Subscribed and sworn to before me this the 4th day of March, A. D. 1909.

A. O. BRACKET,
Clerk U. S. Court, E. D. Tex.

Which said motion was overruled by the court, to which action of the court in overruling said motion, the defendant then and there excepted, and here presents his bill of exceptions, marked No. 1, and prays that it be allowed by the court and ordered filed as a part of the record in this case.

R. McMILLAN, and
E. W. FAGAN,
Attorneys for Defendant.

Allowed this April 30, 1909. Filed April 30, 1909.
D. E. BRYANT, Judge.

A. O. BRACKET, Clerk, by C. C. Bumpas.

Print. Tr. of Record, pages 21, 22.

"Order overruling motion of defendant to transfer case to Oklahoma."

No. 2087.

THE UNITED STATES

Vs.

WILL HENDRIX.

Tuesday, March 4th, 1909.

"The motion of defendant that this cause be remanded to Oklahoma being considered by the court, it is ordered that said motion be overruled, to which action of the court the defendant in open court excepted." Print. Tr. of Record, pages 9, 10.

This cause was tried in said district court of the United States, in and for the Eastern District of Texas, where on the 6th day of March, 1909, the plaintiff in error, William Hendrix, was by a jury found guilty in manner and form as charged in the indictment, without capital punishment." Print. Tr. of Record, page 11.

On the trial of the cause the defendant, William Hendrix, now plaintiff in error, had his wife, Evilena Hendrix, sworn as a witness, in his behalf, and offered to prove by her material facts in his defense. The court refused to allow the witness to testify, which testimony so offered and the ruling, and action of the court, in refusing to allow the witness to testify in the case, is shown by the following bill of exceptions:

In the United States District Court, Sitting at Paris, Texas.

UNITED STATES

Vs.

WILL HENDRIX.

"Be it remembered on the trial of the above entitled cause the following proceedings were had: Defendant had his wife, Evilena Hendrix, sworn and placed on the stand

to testify in his defense and offered to prove by said witness the following facts, which were material to the defense, as follows, to-wit:

That on the Sunday of the killing she had met her husband when he returned home in the buggy; that she had been crying and was very much depressed because of conditions at home; that she went with him to his room, and he asked her what was the matter, and she told him that she could not tell it all now, but for God's sake to get her father off the premises; to buy him out, or trade him out or do something to get him away. That he kept pressing her to tell him and she said no, but after he has gone I will tell you all that has occurred. He kept insisting that she tell him, and at last she told him that on Thursday night, (Thursday night before the killing) and during the time that the little girl Clemmie Hendrix was sleeping in her room, that Voss, her father, came to her bed and was trying to have intercourse with her. That she screamed and woke Clemmie up and the children, and that neither she nor Clemmie slept any more that night; and that she begged him and told him she would scream and prevailed upon him until she got him to go away. He told her that she must not kick, that she was a bastard and not his child, but that she finally was successful and got him to go away. That she knew that if she let this thing go on and her husband found it out from some other source that he would believe that she was living untrue to him. That knowing her husband's disposition, and that if she would tell him the whole truth, that he would kill her father; that under this impression she cried and took on, and that was the reason she told her husband what occurred and went no further than she did. That she had before this told her husband of the affair at Sulphur, but said that her father had agreed to let her alone in the future, and she had asked her husband to do nothing about it, and that he had agreed to do nothing about it then, but had known all about the Sulphur incident all the time. That on the day of the killing, when he re-

turned in the buggy, he was suspecting nothing, but upon seeing her condition the conversation hereinbefore took place; that thereafter the killing occurred. The defendant proposes to show by this witness that her father was a man of reasonably fair education; that she herself nor any of her brothers or sisters could read or write; that he was a lecherous man, and that she herself had seen him go to the bed of her older sister. That she has had to watch him since she was sixteen years old; and that when she was sixteen years old he assailed her; that her mother knew full well his disposition, and that the evening before the killing her mother knew something of it and asked her why she had come over to her house to get her to stay all night with her. That that night her mother said, "Lee, I'm afraid there is going to be trouble between Will and the old man." That she said that while going across the field toward Will Hendrix's home. She denies that there was three trips made by Will Hendrix in an easterly direction from his house before the old man was killed, and denies that Will Hendrix, after the killing, went to the house where the killing occurred three times. That at the time of the shots there was a turmoil of excitement, and she supposes she stated what was related by her mother, "there, pa has killed my baby," as that was what she expected to happen if he got the drop on Will, that he would kill him. That Will's mission down there was to get the old man away and not to have trouble, and that she thought at the time the shots were fired that Will had gone down there and the old man had killed him.

The United States, through her attorney, the Hon. Jno. B. Dailey, objected to the introduction of said witness, on the ground that she was the wife of defendant and therefore incompetent as a witness in said cause. The court sustained said objection and refused to allow said witness to testify in the case. To which action of the court, in sustaining said objection and refusing to allow said witness to testify in his defense, the defendant, then and there excepted, and here presents his bill of exceptions No. 2, and asks

that it be allowed, signed and ordered filed as a part of the record in said cause."

R. McMILLAN, and
E. W. FAGAN,
Attorneys for Defendant, Will Hendrix.

Allowed, this April 30, 1909.

D. E. BRYANT, Judge.

(Endorsed). Or. No. 2087, United States vs. Will Hendrix. Bill of Exceptions No. 2, filed April 30, 1909.

A. O. BRACKET, Clerk.
By C. C. BUMPAS, Deputy.

Print. Tr. of Record, pages 23, 24.

In the District Court of the United States for the Eastern District of Texas:

On the 6th day of March, 1909, the said plaintiff in error, William Hendrix, was by a jury found guilty in manner and form as charged in the indictment, without capital punishment. Print. Tr. of Record, page 11.

On March 9th, 1909, in said district court of the United States, in and for the Eastern District of Texas, after the overruling of his motion for a new trial, the said plaintiff in error, William Hendrix, was adjudged guilty of the murder of Robert W. Voss, in the Indian Territory, as charged in the indictment, and as found by the jury, and his punishment fixed and assessed, that he be imprisoned at hard labor in the penitentiary of the United States, at Atlanta, in the state of Georgia, for the term and period of his natural life. Which judgment and sentence is as follows, to-wit:

In the District Court of the United States, for the Eastern District of Texas.

District Court. No. 2087, Criminal Docket.

THE UNITED STATES

Vs.

WILLIAM HENDRIX.

"Tuesday, March 9th, A. D. 1909.

"On motion of John B. Dailey, Esq., assistant attorney of the United States, for the Eastern District of Texas, the above named defendant, William Hendrix, was this day brought to the bar of the court, in custody of the marshal of said district, and being asked by the court if he had anything to say why the judgment and sentence of the court should not be pronounced against him, in accordance with the verdict of the jury rendered in this cause on the 6th day of March, 1909, and the law in such cases made and provided, and no good cause being shown why the judgment and sentence of the court should not be pronounced herein:

It is therefore considered by the court that the defendant is guilty of the murder of Robert W. Voss, in the Indian Territory, as charged in the indictment and as found by the jury, and his punishment is fixed and assessed as follows, to-wit:

That he be imprisoned at hard labor in the penitentiary of the United States, situated at Atlanta, in the state of Georgia, for the term and period of his natural life.

It is therefore ordered, adjudged and decreed by the court, that the defendant be remanded to the custody of the marshal, and be, by him, committed to the jail of Lamar county, forthwith, and, as soon as practicable, that he be, by the marshal, conveyed to the United States penitentiary designated above, and there be delivered to the custody of the keeper of the said penitentiary, who will receive and safely keep the said William Hendrix imprisoned at hard

labor in said penitentiary, in execution of the sentence aforesaid.

It is further ordered that the clerk of this court issue a mittimus to the marshal of this district, commanding the due execution of this decree.

And it is further ordered that the clerk of this court furnish the marshal with a certified copy of this judgment, sentence and order, which shall be delivered to the keeper of said United States penitentiary, at Atlanta, Georgia.

This order is qualified by the order this day entered as to the custody of the said Will Hendrix." Print. Tr. of Record, page 12.

On the 30th day of April, 1909, a writ of error was allowed in this court by the Honorable D. E. Bryant, judge, upon the petition of plaintiff in error, William Hendrix, filed in this cause, together with an assignment of errors, also filed herein, in which is set out separately and particularly each error asserted and intended to be used. Print. Tr. of Record, pages 24, 25, 26.

The cause is now before this court in error to the district court of the United States for the Eastern District of Texas, which writ of error has been duly served. Print. Tr. of Record page 27.

The assignment of errors filed with the petition for a writ of error is as follows:

ASSIGNMENT OF ERRORS:

In the District Court of the United States, Eastern District of Texas, at Paris, Texas:

THE UNITED STATES

Vs.

WILL HENDRIX.

Now comes Will Hendrix, defendant in the above entitled cause, complaining of the trial, judgment, proceedings, rulings and sentence in said cause, and says that he

has been tried and convicted without due process of the law of the land, and that he has been deprived of his liberty and sentenced to penal servitude for life without jurisdiction so to try and convict him. Your respondent, Will Hendrix, alleges that in his trial and conviction great and manifest errors, to the injury of respondent were committed, which he specifies as follows:

1st. Because the United States Court for the Eastern District of Texas did not have jurisdiction to try said cause, and the court erred in overruling defendant's motion to transfer said case to the district court of Garvin county, Oklahoma, because, under the "Enabling Act," under which Oklahoma became a state, passed by congress June 16th, 1906, all criminal cases pending in the United States courts within and for the Indian Territory, were transferred to the district courts of the state of Oklahoma and to the county of said state wherein the alleged offense is said to have been committed, and the offense for which defendant was tried in this cause was committed in what is now Garvin county, state of Oklahoma.

2d. The court erred in sustaining the objection of the United States to the introduction of defendant's wife, Mrs. Evilena Hendrix, and refusing to allow her to testify in behalf of defendant, for the reason that her testimony as shown by the bill of exceptions in this cause, was vitally material to his defense, and stated facts defendant could not prove by any other witness, and because, under the criminal procedure of the state of Texas, the forum where the case was tried, permits a wife to testify in her husband's defense.

3d. The court erred in overruling defendant's motion for a new trial in this cause, and in refusing to grant defendant a new trial, because: 1st; the United States Court for the Eastern District of Texas was without jurisdiction; 2d; because defendant's wife was not allowed to testify in his defense; 3d; because the attorney for the United States was permitted to prove, over the objection of defendant, that defendant's father had committed crimes in the Indian Ter-

ritory, and because that the jurors did not understand that their verdict would carry with it a life sentence for this defendant, as shown by bill of exceptions No. — and affidavits of said jurors attached to said motion.

For the errors stated and apparent upon the record herein, respondent prays that the judgment be reversed and the cause remanded for a new trial.

Defendant, WILL HENDRIX.
By his Attorneys, R. McMILLAN and
E. W. FAGAN.

(Endorsed:) United States vs. Will Hendrix. Assignment of Errors, filed 30th day of April, 1909.

A. O. BRACKETT, Clerk.
By C. C. BUMPAS, Deputy.

Print. Tr. of Record, pages 25, 26.

ARGUMENT.

In the assignment of errors plaintiff in error complains of the trial, judgment, proceedings and sentence in this cause, and says that he has been tried and convicted without due process of the law of the land, and that he has been deprived of his liberty and sentenced to penal servitude for life without jurisdiction to so try and convict him, which he specifies as follows:

1st. Because the United States court for the Eastern District of Texas did not have jurisdiction to try said cause, and the court erred in overruling defendant's motion to transfer said cause to the district court of Garvin county, Oklahoma, because under the Enabling Act, under which Oklahoma became a state, passed by congress June 16, 1906, all criminal cases pending in the United States courts within and for the Indian Territory were transferred to the district courts of the state of Oklahoma, and to the county of said state wherein the alleged offense is said to have been committed, and the offense for which defendant was tried in this cause, was committed in what is now Garvin county, state of Oklahoma.

Art. III Section 2 of the Federal Constitution, *inter alia*, provides: "The trial of all crimes, except in cases of impeachment, shall be by jury; and such trials shall be held in the state where the said crimes shall have been committed, but when not committed within any state, the trial shall be at such place or places, as the congress may by law have directed." Under the fifth amendment to the Constitution no person can be deprived of his life or liberty without due process of law.

By the sixth amendment to the Constitution it is provided: "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law."

Section 1 of the XIII amendment of the Constitution is as follows: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist in the United States, or any place subject to their jurisdiction."

Jurisdiction in Criminal Case, "*Strictissimi juris.*"

Jurisdiction in a criminal case is never presumed, but must always be shown, is never waived by a defendant, and want of jurisdiction can be attacked at any stage of a criminal proceeding or even collaterally. In re Neilson, 131 U. S., 176; U. S. vs. Rogers, 23 Fed. Rep., 662; In re Mills, 135 U. S., 270; In re Graham, 138 U. S., 451.

Paris Division of Eastern District of Texas; its jurisdiction.

This court was established under act of March 1, 1889, entitled, "An act to establish a United States *Court* in the Indian Territory and for other purposes." The exclusive jurisdiction of the United States *Court* in the Indian Territory at Muscogee, is set forth in the 5th section of the act.

The jurisdiction of the Paris Division of the circuit and district *courts* of the United States for the Eastern Dis-

trict of Texas in cases arising in that portion of the Indian Territory assigned to it by the act, is in the 18th section of said act, in these words: "And the United States *courts* herein provided to be held at Paris shall have exclusive original jurisdiction of all offenses committed against the laws of the United States within that portion of the Indian Territory attached to the Eastern Judicial District of the state of Texas by the provisions of this act, of which jurisdiction is not given by this act, to the *court* herein established in the Indian Territory."

Laws repealed and jurisdiction taken away.

By the act of March 1, 1895, entitled, "An act to provide for the appointment of additional judges of the United States *court* in the Indian Territory, and for other purposes," (28 Stat. L. 697) it is provided as follows: "All laws heretofore enacted conferring jurisdiction upon the United States *courts* held in Arkansas, Kansas and Texas, outside of the limits of the Indian Territory, as defined by law, as to offenses committed in said Indian Territory, as herein provided, are hereby repealed, to take effect on September first, eighteen hundred and ninety-six, and the jurisdiction now conferred by law upon said courts, is hereby given from and after the date aforesaid to the United States court in the Indian Territory: Provided that in all criminal cases where said *courts* outside of the Indian Territory shall have, on September first, eighteen hundred and ninety-six, acquired jurisdiction, they shall retain jurisdiction to try and finally dispose of such cases. Every case, civil and criminal, pending in the United States court in the Indian Territory, shall be tried and disposed of by the court where the same is pending, unless the venue therein be changed as herein provided."

The purpose of this section.

Under this section the United States *court* in the Indian Territory still held the jurisdiction given it under the 5th section of the Act of March 1, 1889, of all offenses against the laws of the United States, not punishable by death, or imprisonment at hard labor. Jurisdiction was given said

United States court in the Indian Territory after September 1, 1896, of all offenses whatsoever committed in said Indian Territory, expressly saving and excepting such cases as the United States circuit and district courts in Texas, Arkansas and Kansas had acquired jurisdiction of before that time, and repealed all laws conferring jurisdiction upon these courts after that date. *In re* Johnson, 167 U. S. 124; U. S. vs. Lee, 84 Fed. Rep., 626.

Law providing for change of venue.

The only law we have been able to find providing for a change of venue from the United States court in the Indian Territory to any court outside of such Territory, or to any court of the United States for the Eastern District of Texas, at Paris, Texas, will be found in the act of June 28, 1898, entitled, "An act for the protection of the people of the Indian Territory, and for other purposes."

Sec. 29. (Ratification of Agreement with Choctaws and Chickasaws). 30 Stat. L. 505. Which provides among other things as follows: "It is further agreed that the United States courts now existing, or that may hereafter be created in the Indian Territory shall have exclusive jurisdiction of all * * * persons charged with homicide, embezzlement, bribery, etc., * * * hereafter committed in the territory of said tribes, without reference to the race or citizenship of the person, or persons charged with such crime, and any citizen, or officer of the Choctaw or Chickasaw Nations charged with such crime shall be tried, and if convicted, punished as though he were a citizen or officer of the United States." * * * "Provided, that whenever a member of the Choctaw and Chickasaw Nations is indicted for homicide, he may, within thirty days after such indictment and his arrest thereon, and before the same is reached for trial, file with the clerk of the court in which he is indicted, his affidavit that he cannot get a fair trial in said court; and it thereupon shall be the duty of the judge of said court to order a change of venue in such case to the United States district court for the Western District of Ar-

kansas, at Fort Smith, Arkansas, or to the United States district court for the Eastern District of Texas, at Paris, Texas, * * * which courts shall have jurisdiction to try the case."

Extra-territorial jurisdiction by change of venue.

Notwithstanding all jurisdiction of crimes and offenses committed in the Indian Territory had been taken away from the District and Circuit Courts of the United States for the whole Eastern District of Texas, including the courts held at Paris, Texas, by the act of March 1, 1895, and the law conferring such jurisdiction expressly repealed, save and except as to cases pending where said courts had acquired jurisdiction, here was an attempt to confer jurisdiction on a *United States District Court at Paris, Texas*, by change of venue from a United States Court in the Indian Territory, an extra-territorial court.

No jurisdiction of capital crimes.

District courts of the United States have no jurisdiction to try capital cases, no jurisdiction to try a person indicted for murder, charged to have been committed on land, and no power or jurisdiction to sentence a person for a capital offense so committed, either to suffer death or life imprisonment.

U. S. R. S., Sec. 563, is as follows: "The district courts shall have jurisdiction as follows: First of all, crimes and offenses cognizable under the authority of the United States, committed within their respective districts, or upon the high seas, the punishment of which is not capital, except in the cases mentioned in section fifty-four hundred and twelve, Title 'Crimes.'" (Exception has no application here).

The Circuit Courts of the United States have exclusive jurisdiction of all capital cases. U. S. R. S., Sec. 629, twentieth subdivision.

The indictment in this case charges a crime, (murder)

punishable by death. U. S. R. S., Sec. 5339, and the offense is no less capital, although the jury by their verdict found the defendant (plaintiff in error) guilty as charged in the indictment, "without capital punishment." Fitzpatrick vs. U. S., 178 U. S., 304; Goodshot vs. U. S., 104 Fed. Rep., 257.

The United States Court in the Indian Territory had jurisdiction until taken away by the Enabling Act.

The indictment in this case charges the offense or crime of murder to have been committed by William Hendrix (plaintiff in error) on the 15th of April, 1906, within the Southern District of the Indian Territory. It was filed in said United States Court in the Indian Territory May 28, 1906. Print. Tr. of Record, pages 5, 6, and the Transcript of Record was filed June the 3d, 1906, at Paris, by A. O. Bracket, Clerk, by J. B. Dailey, deputy. Print. Tr. of Record, page 8. The record does not show the court in which the transcript of record was filed, nor that any court at Paris took jurisdiction of the person of Hendrix before his trial, March 6, 1909. On June the 16, 1906, Congress passed what is known as the "Enabling Act," an act to enable the people of Oklahoma and of the Indian Territory to form a constitution and state government and be admitted into the Union, on an equal footing with the original states. 34 Stat. L. 267.

Jurisdiction taken away without saving and excepting cases pending.

Sec. 20 of said Enabling Act, as amended by the act of March 4, 1907, is as follows: "That all causes, proceedings and matters, civil or criminal, pending in the district courts of Oklahoma Territory, or in the United States Courts in the Indian Territory, at the time said Territories become a state not transferred to the United States Circuit or District Courts in the State of Oklahoma, shall be proceeded with, held and determined by the courts of said state, the success-

ors of said District Courts of the Territory of Oklahoma and the United States Courts in the Indian Territory, with right to prosecute appeals or writs of error to the Supreme or Appellate Court of said state, and also with the same right to prosecute appeals or writs of error from the final determination in such cases made by the Supreme or Appellate Court of such state, to the Supreme Court of the United States, as is provided by law for appeals and writs of error from the Supreme, or final Appellate Court of a state to the Supreme Court of the United States. All criminal cases pending in the United States Courts in the Indian Territory not transferred to the United States Circuit or District Courts in the State of Oklahoma, shall be prosecuted to a final determination in the state courts of Oklahoma under the law now in force in that territory." 34 Stat. L., 1287.

Enabling Act accepted by Constitutional Convention of Oklahoma.

"Be it ordained by the Constitutional Convention for the proposed State of Oklahoma, that said Constitutional Convention do, by this ordinance irrevocable, accept the terms and conditions of an Act of the Congress of the United States, entitled, "An Act to enable the people of Oklahoma and the Indian Territory to form a constitution and state government and be admitted into the Union on an equal footing with the original states; and to enable the people of New Mexico and Arizona to form a constitution and state government and be admitted into the Union on an equal footing with the original states," approved June the sixteenth, Anno Domini, nineteen hundred and six.

I hereby certify that the foregoing ordinance accepting the terms and conditions of the Enabling Act as the same has heretofore been passed and engrossed, was engrossed with the engrossed copy of the Constitution on parchment, was read as engrossed and roll call had thereon, and the same duly adopted by a majority of the votes of all the delegates elected to and constituting

this Convention at 11:41 o'clock, A. M., this 22d day of April, Anno Domini, 1907."

Wm. H. MURRAY, President,

The Constitutional Convention of the proposed State of Oklahoma.

Attest: JOHN McLAIN YOUNG, Secretary."

By the adoption of the Constitution by the people of Oklahoma at the election held in the same year and the approval of said Constitution by the president of the United States on November 16 1907, Oklahoma became a state.

Act June 28, 1898, so far as it conferred jurisdiction, repealed, jurisdiction fell with it.

The "Enabling Act" makes no exception or provision saving any cases pending in the United States Court in the Indian Territory, nor does it contain any provision saving and excepting cases then pending in any of the United States Courts at Paris, Texas, or in the Eastern District of Texas, on change of venue. All laws passed prior to this conferring jurisdiction on the United States Courts in the Indian Territory were repealed, and the courts abolished.

It is well settled that "when the jurisdiction of a cause depends upon a statute, the repeal of the statute takes away the jurisdiction, and causes pending at the time fall, unless saved by provision of the statute."

United States vs. Boisdore, 8 How., 113.
Baltimore and P. R. Co. vs. Grant, 98 U. S., 398.
United States vs. Tymen, 11 Wall., 88.
Merchants Ins. Co. vs. Ritchie, 5 Wall., 541.
McNulty vs. Batty, 10 How., 79, 13 L. ed. 335.
Exparte McCradle, 7 Wall., 514, 19 L. ed. 265.
Downes vs. Bidwell, 182 U. S. 248, 45 L. ed. 1091.
Gwin vs. United States, 184 U. S. 675, 46 L. ed. 750.
Murphy vs. Utter, 186 U. S. 109, 46 L. ed. 1078.
Bird vs. United States, 187 U. S., 124, 47 L. ed. 103.
Colt vs. Young, 2 Blatchf, 473 Fed. Cas. No. 3032.

United States vs. Barr, 4 Sawy. 255, Fed. Cas. No. 14527.
United States vs. Hague, 22 Fed., 706.
United States vs. VanVilet, 23 Fed., 35.
Manley vs. Olney, 32 Fed. 709.
Birdseye vs. Sheffer, 37 Fed., 825.
Aspley vs. Murphy, 50 Fed., 377.
Postal Tel. Cable Co. vs. Southern R. Co., 89 Fed., 194.
Fairchild vs. United States, 91 Fed. 298.
Strong vs. United States, 93 Fed. 258.
Emblen vs. Lincoln Land Co., 94 Fed. 713.
United States vs. Jacobus, 37 C.C.A., 469, 96 Fed. 262.
United States vs. Kelley, 38 C.C.A. 276, 97 Fed.461.
Cincinnati Brewing Co. vs. Betteman, 102 Fed., 17.
Emblen vs. Lincoln Land Co., 42 C. C. A. 502, 102 Fed. 562.
McClain vs. Williams, 10 S. D., 336; 43 L. R. A., 289; 73 N. W., 72.
Raush vs. Morrison, 47 Ind. 416.
State ex rel Atty. Genl. vs. Wharton, 25 La. Ann. 32.
Waimsley vs. Nichols, 36 La. Ann., 801.
State ex rel Church vs. Weeks, 38 Mo. App., 579.
Olcott vs. Maclean, 10 Hun., 282.
State vs. Bank of Tennessee, 3 Baxt., 409.
Texas Mexican R. Co. vs. Jarvis, 80 Texas, 464; 15 S. W., 1089.

So if an act conferring jurisdiction is repealed, without reservation as to pending cases, they fall with it.

Sherman vs. Grinnell, 123 U. S., 679.
National Bank vs. Peters, 144 U. S., 570.
Gurnee vs. Patrick County, 137 U. S., 141.
United States vs. Kelley, 38 C.C.A. 276, 97 Fed. 461
Sims vs. Black Dog, 9 Oklahoma, 671.

And if a statute giving a special remedy is repealed without a saving clause in favor of pending suits, all suits must stop where the repeal finds them.

South Carolina ex rel, Trenholm vs. Gillard, 101 U. S., 433.
Texas Mexican R.R. Co. vs. Jarvis, 80 Tex., 464.
Larkin vs. Safians, 15 Fed., 153.
Vance vs. Rankin, 198 Ill., 627.
Griffis vs. Payne, 22 Tex. Civ. App., 522.
Burlington vs. Burlington Traction Co., 70 Vt., 495.
Dulin vs. Lillard, 91 Va., 725.

In the case of South Carolina vs. Gillard, *supra*, this court says: "It is well settled that if a statute giving a special remedy is repealed without a saving clause in favor of pending suits, all suits must stop where the repeal finds them."

In the case of the Texas Mexican Ry. Co. vs. Jarvis, *supra*, Chief Justice Stayton delivering the opinion of the court, says: "The act in question * * * presents a case in which the jurisdiction of the courts ceased, stronger if possible, than in cases in which the statute conferring jurisdiction is subsequently repealed: * * * Many cases have arisen in which jurisdiction was conferred by statute, in which it was held by the highest courts in the land, that the repeal of the statute, divested the courts of power to hear and determine pending causes." (Citing authorities).

In United States vs. Boisdore, *supra*, this court said: "It is true that this court can exercise no appellate power over this case unless it is conferred upon it by act of congress, and if the laws which give it jurisdiction in such cases have expired, so far as regards claims in the state of Missouri, its jurisdiction over them has ceased, although the appeal was actually pending in this court when they expired.

On the 6th and 9th of March, 1909, nearly two years after the repeal of all laws conferring jurisdiction on the United States Courts in the Indian Territory and such

courts, including the court that transferred this cause to the United States Court at Paris, had expired and become extinct, and with it the law authorizing, and the power of, such court to make an order so transferring this cause, had been taken away and repealed by the act of congress known as the "Enabling Act," and the State of Oklahoma had been erected, and the state courts had succeeded to the jurisdiction of the United States courts in the Indian Territory, the plaintiff in error, over his objections and protest, was tried in the District Court of the United States for the Eastern District of Texas, at Paris, Texas, for the crime of murder, alleged to have been committed on the 15th of April, 1906, in the Indian Territory, upon an indictment filed in the United States courts for the Southern District of the Indian Territory, at Pauls Valley, on the 28th of May 1906, (nineteen days before the Enabling Act was passed by congress) was adjudged guilty of murder, and sentenced by said District Court of the United States for the Eastern District of Texas, at Paris, Texas, to penal servitude for life, (Print. Tr. of Record, pages 5, 6 and 10, 11 and 12.) when by law said court was without jurisdiction of the offense charged, and was without power to try and sentence the plaintiff in error.

Jurisdiction of the offense and of the person necessary.

The District Court of the United States for the Eastern District of Texas, to have had jurisdiction in this case by the order transferring the same, must not only have had jurisdiction of the offense, but must have obtained jurisdiction of the person of the defendant, by some means known to the law. In re Johnson, 167 U. S., bottom of page 124, and authorities cited.

There is nothing in the record to show that the District Court for the Eastern District of Texas took or obtained jurisdiction of the person of the defendant, William Hendrix, by any mode known to the law, either by custody or bail, until March 4, 1909, when he was arraigned for trial,

nor does the order transferring the case order said defendant to be delivered to the marshal of the Eastern District of Texas. The order transferring this case is fatal and void for uncertainty and does not find the jurisdictional facts necessary under the law.

The order of the United States Court for the Southern District of the Indian Territory transfers the case to the United States Court at Paris, Texas. (Print. Tr. of Record, page 7). There were the District and Circuit Courts of the United States for the Eastern District of Texas, at Paris, Texas, but no court by name "United States Court." To which of these courts was this case transferred? The law provided that it should be transferred to the District Court for the Eastern District of Texas, at Paris, Texas, or to the District Court of the Western District of Arkansas, at Fort Smith, Arkansas, besides the jurisdictional facts or findings authorizing such change of venue or transfer is not shown by the record or by the order of the court. Only a member of the Chickasaw or Choctaw tribes of Indians was named in the law as entitled to such change of venue upon making affidavit, that he could not get a fair and impartial trial in said United States Court for the Indian Territory. The order of the court appears to have been on the motion of the defendant, but consent could not give jurisdiction where the court was otherwise without jurisdiction or power to hear and determine.

The wife was a competent witness.

The second specification of error is: "The court erred in sustaining the objection of the United States to the introduction of defendant's wife, Mrs. Evilena Hendrix, and refusing to allow her to testify in behalf of defendant, for the reason that her testimony, as shown by the bill of exceptions in this case, was vitally material to his defense, and stated facts defendant could not prove by any other witness, and because, under the criminal procedure of the State of Texas, the forum where the case was tried, permits a wife to testify in her husband's defense." And plaintiff in error

here now further specifies that by the laws of Oklahoma, the forum where this case should have been tried, a wife is a competent witness to testify for her husband in all criminal prosecutions against him. The bill of exceptions which shows the facts proposed to be proven by the testimony of the wife, Mrs. Evilena Hendrix, and the action of the trial court in holding the wife incompetent to testify for the husband, and excluding her testimony from the jury, is set out in full on page 6 and 7 of this brief, to which reference is here made.

U. S. R. S., Sec. 858, provides: "In the courts of the United States no witness shall be excluded in any action on account of color, or in civil actions, because he is a party to or interested in the issue tried." (Then follows a proviso as to executors, administrators and guardians not material here). "In all other respects the laws of the state in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States, in trials at common law and in equity and admiralty. We are aware of the construction given this statute by this court in Logan vs. the United States, 144 U. S., 263, but we do not believe that case is conclusive of the question here presented. The question of the competency of the wife as a witness for her husband was not raised in the Logan case. In Lucas vs. Brooks, 18 Wall., 436, this court held that if the wife was a competent witness by the state statute, that was controling.

Art. 775 of the Code of Criminal Procedure of Texas, reads as follows: "The husband and wife may, in all criminal actions, be witnesses for each other, but they shall in no case testify against each other except in a criminal prosecution for an offense committed by one against the other."

Under the Oklahoma statutes the wife is a competent witness for her husband. The statute is as follows: "Except as otherwise provided in chapters 68 and 69, of the Statutes of Oklahoma, the rules of evidence in civil cases, are applicable also in criminal cases: Provided, however,

that neither husband nor wife shall in any case be a witness against the other except for a crime committed one against the other, but they may in all cases be witnesses for each other, and shall be subject to cross-examination as other witnesses, and shall in no event on a criminal trial be permitted to disclose communications made by one to the other except on a trial of an offense committed by one against the other." Wilson's Revised and Annotated Statutes of Oklahoma, 1903, Criminal Procedure, page 1232, Section 5495; Snyder's Compiled Laws of Oklahoma, 1909, Criminal Procedure, page 1399, Section 6834. This was also the law in the territory of Oklahoma, (L. 1895, page 201) and was adopted by the Constitutional Convention of the State of Oklahoma as follows: "All laws in force in the Territory of Oklahoma at the time of the admission of the state into the Union, which are not repugnant to this Constitution, and which are not locally inapplicable, shall be extended to and remain in force in the State of Oklahoma, until they expire by their own limitation, or are altered or repealed by law." Constitution of Oklahoma, Art. 24, Title Schedule, Section 2.

Offenses punishable with death, where tried.

U. S. R. S., Sec. 729, is as follows: "The trial of offenses punishable with death shall be had in the county where the offense *was* committed, where that can be done without great inconvenience." If the motion of plaintiff in error to remand this case to the District Court of Garvin county, Oklahoma, had been granted, he would have been tried in the county where the offense was committed, as provided in Sec. 729; not only that, his wife would have been a competent witness for him under the statute of Oklahoma. Her testimony detailing the diabolical acts of the deceased towards her, as shown in the bill of exceptions, was vital and material and would at least have reduced the killing to manslaughter.

Were these rights lost by transfer of the case?

Did the removal of the case to the Paris court, upon a ground, and for a reason that no longer existed, the prejudice of the judge of the United States Court of the Indian Territory, which court had been abolished, and such judge had ceased to be judge, forever take away from plaintiff in error his right to be tried in the vicinage where the alleged offense was committed, by a jury of such vicinage, and deprive him of the testimony of his wife, vouchsafed to him by the laws of the State and Territory where the homicide took place? If so, the law which was intended by congress specially for the benefit of members of the Choctaw and Chickasaw tribes, and for their protection against prejudice, operated as a snare and a delusion. See Texas, etc., R. R. vs. Humble, 181 U. S., 60.

The third specification of error complains of the action of the court in overruling defendant's motion for a new trial: 1st, "because the United States Court for the Eastern District of Texas was without jurisdiction;" 2d, "because defendant's wife was not allowed to testify in his defense;" 3d, among other things, "because the jurors did not understand that their verdict would carry with it a life sentence for this defendant, as shown by bill of exceptions No. — and affidavits of said jurors attached to said motion."

In connection with the motion for a new trial in this case were filed the affidavits of four of the jurors, who each swore he did not understand the verdict in this case to mean a life sentence for the defendant, and had he known that the only punishment, or sentence to the defendant, upon the verdict rendered, would be imprisonment for life, he never would have rendered such verdict, or consented to the same. Print. Tr. of Record, bottom of page 15 and pages 16, 17 and 18.

We are aware of the doctrine that jurors cannot be permitted to impeach their verdict. Mattox vs. United States, 146 U. S. 140. Does this rule apply here? The

jurors swore they did not understand the verdict rendered. The defendant was indicted for murder. This indictment included the offense of manslaughter. It appears from the affidavits of the jurors that the judge presiding, in his charge to them, instructed them on the law of murder and manslaughter, and self-defense. The verdict does not find the defendant guilty of murder in so many words, but finds "the defendant, William Hendrix, guilty in manner and form as charged in the within indictment without capital punishment." Print. Tr. of Record, page 11.

It is clear from the affidavits filed that the jury in this case discussed the punishment, and did not intend their verdict to carry a greater punishment than that for manslaughter.

Unanimity is one of the essential features of trial by jury; it was so at the common law, and is preserved and protected by constitutional guarantee. American Pub. Co. vs. Fisher, 166 U. S. 464; Springville vs. Thomas, 166 U. S., 707.

With this we submit the cause of our client. We were not of counsel in the case when it was tried in the court below, and know nothing about the case, except as is shown in the record, made and preserved by the learned counsel who faithfully represented the defendant (now plaintiff in error) at his trial.

Can it be held by this court, that the trial, conviction, and sentence, by which defendant was deprived of his liberty for life, was by "due process of law," and that his sentence to penal servitude for life, was as a punishment for crime, whereof he had been duly convicted? We think not.

Respectfully submitted,

JAMES G. DUDLEY,

Of Counsel for Plaintiff in Error,

WILLIAM HENDRIX.

Office Supreme Court, U. S.
FILED.
NOV 28 1910
JAMES H. McKENNEY,

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 319.

WILLIAM HENDRIX, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

SUPPLEMENTAL BRIEF OR REPLY FOR PLAINTIFF IN ERROR.

The learned assistant attorney general misconceives the controlling question in this case. It is *not* claimed that the United States statute defining and punishing the offense of murder has been repealed, nor is it necessary that such statute should have been repealed in order for our contention to find support. The question here raised is the jurisdiction of the District Court of the United States for the Eastern District of Texas, to try and sentence plaintiff in error for the offense of murder committed not in said dis-

trict, but charged to have been committed in the Southern District of the Indian Territory. If said District Court did not have jurisdiction, the trial, judgment, and sentence of said court "is not due process of law."

Scott *vs.* McNeal, 154 U. S., 34.

The only original jurisdiction the District and Circuit Courts of the United States for the Eastern District of Texas ever had over any offenses committed in the Indian Territory was conferred by statute (Act March 1, 1889). This jurisdiction was taken away, and the law conferring such jurisdiction repealed, by act March 1, 1895, expressly saving cases of which jurisdiction shall have been acquired by September 1, 1896. Thus the law stood when the act of June 28, 1898, was passed, attempting to confer jurisdiction on the United States District Courts for the Western District of Arkansas, and Eastern District of Texas at Fort Smith, Arkansas, and Paris, Texas, respectively, by change of venue, in cases only in which a member of the Choctaw and Chickasaw nations is indicted for *homicide*. We believe this law was unconstitutional and void because it attempted to confer jurisdiction by change of venue on a United States District Court at Paris, Texas, of a crime, the punishment of which is capital, when under the established law of the United States defining and providing for the jurisdiction of her courts, district courts have no jurisdiction to try capital cases, no jurisdiction to try crimes the punishment of which is capital. Suppose the law had provided for a change of venue to the United States Commissioner's Court at Paris, Texas, and the Commissioner's Court, because the law said so, had assumed jurisdiction and had tried and sentenced plaintiff in error for the crime of murder, as did the District Court of the United States at Paris, Texas, would it be "due process of law"? As we understand it, "due process of law," in a criminal case, by which one may be deprived

of life or liberty, means according to a course of judicial proceedings established and recognized by the law of the land, for the trial and punishment of such cases. Besides, if this act providing for a change of venue conferred any jurisdiction on the District Court of the United States at Paris, Texas, it was special and limited, applied only to members of the Choctaw and Chickasaw nations, indicted for homicide, on making a certain affidavit. Aside from the general rule that the record of a court having acquired jurisdiction of special and limited cases, must show such jurisdiction. This court has held there is no presumption in favor of the jurisdiction of the courts of the United States, but the jurisdictional facts, upon which jurisdiction rests must appear from the record.

Ex parte Smith, 94 U. S., 453.

This case is cited in the following cases:

Grace *vs.* Cent. Ins. Co., 109 U. S., 283.
Smith *vs.* McNeal, 109 U. S., 431.
Ins. Co. *vs.* Rhoads, 119 U. S., 239.
Fishback *vs.* West. U. Teleg. Co., 161 U. S., 100.

There is nothing in this record to show the jurisdictional facts upon which the jurisdiction of the court at Paris depended; that plaintiff in error is a member of the Choctaw and Chickasaw nations, or that he filed an affidavit setting up such fact, and that he could not get a fair trial in the United States Court for the Southern District, Indian Territory. On the contrary, the order changing the venue shows it was granted on motion.

Our contention is that there never was any legal change of venue of this case from the United States court in the Indian Territory and that the United States District Court at Paris, Texas, never legally acquired jurisdiction of the

case and of the person of Hendrix before the enabling act was passed. If we are correct in this, the case was still pending in the United States court in the Indian Territory when Oklahoma became a State, and the jurisdiction to try the case passed to the State court of Oklahoma under the enabling act. The argument of the assistant attorney general, that plaintiff in error cannot now raise this question, is unsound. It is elementary that consent cannot give jurisdiction. The jurisdiction must rest upon the jurisdictional facts upon which it depends, and upon the power of the court under the law to hear and determine, and not upon consent or even the most solemn agreement. The fact that the names William Hendrix and Evalena Hendrix appear on the roll proves nothing material to this enquiry. This court cannot judicially know that he is the same party charged with killing Robert W. Voss, or the same party who filed a motion to change the venue to the Paris court. Moreover, this court holds that the jurisdictional facts must have been alleged and shown. See *Ex parte* Smith, *supra*. The Ball and Boutwell case *from the Circuit Court* of the United States for the Eastern District of Texas, at Paris, Texas, it will be observed, and the other cases cited by the counsel for the Government on the question of former jeopardy, have no application to this question of jurisdiction. Finally, our contention is that if the District Court of the United States for the Eastern District of Texas got jurisdiction by change of venue when the enabling act was passed and Oklahoma became a State and the United States courts in the Indian Territory were abolished and the jurisdiction of said courts taken away and conferred upon circuit and district courts of the United States, and the State courts in said State, and absolutely wiping out the statute which conferred any jurisdiction on the United States District Court at Paris, by change of venue or otherwise, without saving cases pending in said court by change of venue from the United States

courts in the Indian Territory. The jurisdiction of the District Court of the United States for the Eastern District of Texas, at Paris, Texas, to try this case, if it ever had any, ceased, and said court had no power to try and sentence plaintiff in error for a crime the punishment of which is capital, upon the doctrine as old as this court, "That if an act conferring jurisdiction is repealed without reservation as to pending cases, they fall with it."

Respectfully submitted,

JAMES G. DUDLEY,
Of Counsel for Plaintiff in Error.